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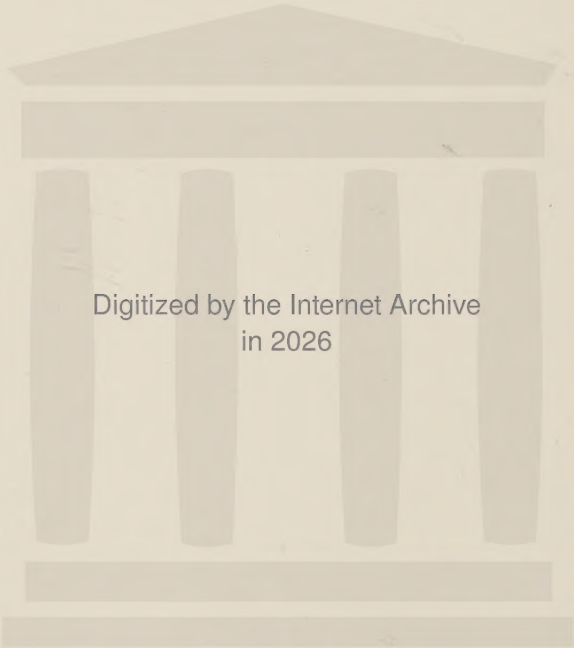

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INVESTIGATIONS IN AGRICULTURAL ECONOMICS

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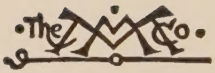

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THE LEGAL STATUS OF AGRICULTURAL CO-OPERATION

BY

EDWIN G. NOURSE

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DIRECTOR'S PREFACE

The prolonged depression of American agriculture suggests the necessity of thoroughgoing effort toward the permanent organization of farming as an industry, along lines that will promote efficiency of operation and stability of conditions at least comparable to those which obtain in other lines of business. The growth of agricultural co-operative associations in recent years has given rise to the view that in this new form of organization is to be found the salvation of the American farmer. In a sense, the agricultural co-operative is regarded as a counterpart of the business corporation and of the trade association.

This volume is an examination of the evolution of this new type of business organization. It analyzes the economic objectives of agricultural co-operative associations; shows the difficulties by which they have been confronted, the way in which these have been removed through statute and case law, and the character of the issues which still remain for judicial determination; and emphasizes the significance of co-operation as a large-scale organizing and presumably stabilizing factor in agriculture.

The movement has suffered because those who

have been drafted to positions of service in it, whether lawyers, executives, or economists, have commonly possessed an inadequate conception of the requirements and objectives of the institution with which they were connected. The economist has been too little aware of the legal requirements and the lawyer too little versed in the fundamentals of economics and business for either to get an adequate grasp of the issues involved in the organization and operation of co-operatives. At the same time, members, directors, and officials have been so deeply engrossed in practical considerations that they could devote little thought to either the economic or legal implications of co-operation. Moreover, they have had scant knowledge of experiments along similar lines in the past and have generally not possessed that broad understanding which can come only from comparative examination of the evolution of co-operative enterprise in different parts of the country, among different groups of co-operators, and with different commodities.

This study deals with legal materials from the economic point of view. It is an appraisal of the law and legal decisions relating to co-operation, in terms of economic purposes and commercial requirements. The author of this volume is an economist who has long had a first-hand acquaintance with agricultural conditions and been closely associated with the co-operative movement. On the basis of these intimate contacts, supplemented by exhaustive

research, he has presented a well-rounded economic and legal interpretation of the co-operative movement. The result should be a more intelligent and constructive attitude with reference to an institution which gives genuine promise of being one of the most important factors in the organization and stabilization of American agriculture.

HAROLD G. MOULTON,
Director.

Institute of Economics,
April, 1927.

AUTHOR'S ACKNOWLEDGMENTS

This volume is not offered as a legal textbook, nor is the author trained in the law or versed in its practice. His professional background is that of the economist, and his concern has been to analyze the economic ideas and purposes which seek expression through co-operative organization and to ascertain in what degree legislatures and courts have comprehended these aspirations and thought it either prudent or safe to give them recognition in statute and case law.

Owing to the technical legal considerations involved, the writing of the book would have been impossible without the generous collaboration of a considerable number of men engaged in the practice or teaching of law and identified directly or indirectly with the activities of co-operative associations. These men have read the manuscript of the book either in its entirety or certain chapters or particular passages and have given the author the benefit of criticism and suggestion. Special acknowledgment should be made of the material assistance rendered by the following: Professor Henry W. Ballantine, School of Jurisprudence, University of California; Harry M. Creech, Managing Director and Counsel,

Sun Maid Raisin Growers of California; Senator Charles S. Deneen, formerly Counsel for Chicago Milk Producers' Association; Frank Evans, Marketing Counsel, American Farm Bureau Federation; Reuben Hall, Counsel, New England Milk Producers' Association; Professor Nathan Isaacs, Graduate School of Business Administration, Harvard University; L. S. Hulbert, Division of Co-operative Marketing, United States Department of Agriculture; John D. Miller, Vice-President and Counsel, Dairymen's League Co-operative Association; J. G. Mitchell, Counsel for various Iowa co-operatives; Professor Herman Oliphant, School of Law, Columbia University; Alvin C. Reis, formerly Assistant Attorney General of the state of Wisconsin; Aaron Sapiro, Counsel for various co-operative associations.

In addition to these men of legal training, several others particularly conversant with the evolution of the co-operative movement have been consulted and their suggestions availed of. The author is under special obligation in this connection to Charles J. Brand, formerly Chief of the Bureau of Markets of the United States Department of Agriculture; Professor O. B. Jesness, Head of the Department of Markets, University of Kentucky; and Walton Peteet, formerly Secretary, National Council of Farmers' Co-operative Marketing Associations.

All these are persons whose experience in co-operative undertakings has been wide and varied. Their views on many points differ one from another

and from those held by the author. While a considerable reconcilement of such divergencies of thought has taken place during the writing of the book, it is not to be expected that complete agreement would be attained. The plan of presentation followed by the author, therefore, has been to give his own interpretation of the whole matter as the main text of the book, but to supplement this by numerous footnote references in which the dissenting views of others have been set forth for purposes of comparative study. It is believed that by this method the reader will find himself supplied with the most useful material from which to obtain an understanding of the issues involved and the maximum help toward reaching sound conclusions of his own.

EDWIN G. NOURSE.

Washington, D. C.
April, 1927.

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THE LEGAL STATUS OF AGRICULTURAL CO-OPERATION

THE LEGAL STATUS OF AGRICULTURAL CO-OPERATION

INTRODUCTION

For a period of fully three-quarters of a century groups of people in the United States have been embarking upon business enterprises under some form of organization which they were pleased to call "co-operative." In many instances such undertakings have been rather informal, unincorporated associations, but in a large and increasing number of cases they have sought the privileges and safeguards which might be secured under forms of incorporation made available by law.

Some of the earliest of these organizations were set up by special acts of state legislatures prior to the time when general corporation laws were available. Later, as such corporation laws were enacted by an increasing number of states, they were utilized freely for the incorporation of groups of persons who desired to undertake business on a co-operative plan. In many instances, however, organization under these general corporation laws precluded the adoption of the structural forms or practices of control or operation which were regarded as essen-

tial by the would-be "co-operators." [1] Furthermore, even when general corporation laws might possess the negative merit of not prohibiting distinctively co-operative procedures, there was still a demand for something positively satisfying in the sense of defining and authorizing definitely and affirmatively the type of business enterprise which the co-operative group sought to establish.

Hence, from 1865 to the present the process of framing, enacting, and amending such legislation has been going steadily forward. Pioneer efforts in this direction were widely scattered geographically and were rather spasmodic as to time. Nor was the interest in the matter by any means universal; as late as 1900 only about ten states had enacted special co-operative laws. Since that time, however, progress has been more rapid, and today there is only a single state in the Union [2] which does not have at least one law governing co-operative associations. Some states have continued old laws on the books when new statutes were added, and to their general laws covering the organization and operation of co-operative associations have added

[1] The character of these distinctive practices will be elaborated in some detail in the following chapter of this book. Since co-operatives sought a non-profit type of association, they often made use of laws designed for the incorporation of literary or charitable associations, libraries, cemeteries, and the like rather than general corporation laws. Compare footnote 6, p. 55, and p. 128.

[2] Delaware. The state of Vermont does not have a separate co-operative statute, but does have a section in her general corporate law which makes provision for co-operative associations.

special statutes touching questions of restraint of trade or other issues of co-operative practice. To these state laws there have been added also two Federal enactments touching directly on co-operative organizations and several measures bearing indirectly upon such associations.

This mass of legislation may conveniently be grouped under a threefold classification: (1) statutes designed merely to authorize the formation of business organizations of this particular type—enabling acts; (2) such supplementary statutes as have been enacted to define the status of the so-called co-operative associations with reference to the question of monopoly or combination in restraint of trade; and (3) an increasing number of statutes which, though not in their own terms relating explicitly to co-operative organizations, are found in practice to be necessary adjustments of general commercial law required for the effective functioning of the new types of commercial agencies brought into being under the laws authorizing co-operative business associations. Illustrative of this third division of co-operative legislation are measures touching financing, warehousing, crop liens, public auction markets, standardization and inspection, and the like.

Furthermore, when we speak of "the law" we do not limit ourselves to what is written on the statute books. It is judicial decision which puts flesh upon the bones of legislative intent and gives us the

living body of the law. Both the older and the newer co-operative legislation has been from time to time tested in the courts, and various associations, whether organized under these special statutes or not, have on numerous occasions had their actions subjected to judicial review. Thus there has been built up a body of judicial opinion on the subject of co-operation, and there have been handed down many decisions governing the affairs of co-operative bodies which, along with the statutes, give us today "the law" of co-operative business.[3]

The enunciation of public policy by legislatures and courts is likely to follow the trend of public opinion among the rank and file of citizens. Hence, the wise treatment of an institution which is assuming such great importance as is the co-operative association demands on the part of the public correct information and sound understanding of its real nature and purposes. This we do not have today. Our people are so saturated with the ideas of non-co-operative business that they find it hard to

[3] Still a third phase of the matter might be distinguished. The legalization of co-operative practices is to some extent determined by agreement with executive agencies of the government. Thus, for example, the manner in which grading, inspection, and packaging will be handled sometimes becomes a matter of agreement between a co-operative association and the United States Department of Agriculture. Similarly the form of credit instruments to be used and the procedures to be followed in handling them may be made a matter of formal agreement between co-operative agencies and the Treasury Department, working through the Intermediate Credit system or the Federal Reserve Banks. No attempt will be made in this book, however, to discuss the nature or significance of such agreements as a factor in the control of co-operative institutions.

grasp the distinctive philosophy of "organization for service" or the non-profit method of operation or the non-stock form of organization which is sometimes employed. It is necessary that we should make historical and comparative studies to show what are these underlying peculiarities and how this particular institution fits into our general economic system, how it can be aided in realizing its proposed benefits most fully, and how it can be safeguarded against mistakes which would harm itself or courses of action which would injure those with whom it deals.

The purpose of the present book is to examine the body of co-operative law as it has thus far been developed in the United States, our chief objects being to set forth: (1) the economic philosophy of co-operative business as it has been evolved in the minds of so-called "co-operators," (2) the manner in which these economic purposes have come to expression in specialized statutes, (3) the relation of these laws and the practices of co-operative associations to the general body of our commercial law, and (4) the attitude of courts in applying both general and special statutes to the cases which have come before them, noting particularly (5) the bearing of all this upon the question of competition, business stabilization, and restraint of trade as a great general issue of our current economic institutions.

As it happens, the co-operative form of business

organization has developed most completely and most vigorously in the United States in conjunction with our agricultural industry. The consumer movement has gained some foothold, and a few statutes have been provided for the particular use of consumers' associations. Industrial co-operation has been covered only in connection with certain general co-operative laws. In the main, co-operative legislation has been inspired by agricultural interests and has been availed of chiefly for carrying on agricultural lines of business. Indeed, even within the agricultural field further specialization has been evident. Interest has centered especially upon the marketing phase of the farmer's business, and many of the recent laws have been drawn specifically as "marketing acts." This specialization of the movement in its later stages will be brought out as the discussion progresses. At the beginning, however, we shall discuss the co-operative philosophy in its more general terms and observe its application to early legislation of broad scope.

CHAPTER I

THE LEGAL MOLD OF AN ECONOMIC INSTITUTION

The evolution of our business institutions shows us a long procession of experimental procedures, giving rise to *de facto* commercial forms, many of which have in turn demanded such recognition *de jure* as should make their position in the business world both clear and safe. The law merchant sprang from the need of expediting and regularizing trade relations so that the expansion of commercial activity might not be retarded. After being upheld more or less adequately by private though organized sanctions, many of these customs of the merchants passed into the common law and thence onto our statute books or have been superseded by enactments of other tenor which have been placed there. In a specialized field of our economic development —the pecuniary economy—a long succession of steps in perfecting money and credit mechanisms has given us an elaborate set of institutions, private and public, operating under a rather extensive and detailed banking code. A third illustration of the manner in which law may conserve the successful

experiments of evolving business is to be found in the corporation.[1] It is with a particular phase of this development that the present volume deals.

Individual enterprise and even business partnerships were grossly inadequate to meet the demand for giant undertakings such as were made possible by the technical progress of our modern age and which were necessary if these technical possibilities were to be realized in practice. It was essential that great size and a considerable degree of permanence be achieved if unprecedented accumulations of capital were to be brought together from a large number of investors. To attract their capital, the risk to such stockholders must be definitely restricted under the principle of limited liability, and they must be

[1] "Recently, corporations have furnished the most vital type of business organization. Here we have the separate entity of the business organization recognized, and innumerable contracts and possible contracts among those who have an interest in the organization taken care of by general provisions in the statutes. For the analogy on the basis of which the law relating to business corporations has been built up by courts and legislatures we must go back to those semi-governmental corporations which were chartered at the beginning of the sixteenth century and of which the East India Company and the several American colonization companies are the best known examples. Thus corporation law is an attempt to apply to business needs quasi-governmental ideas." Schaub, L. F. and Isaacs, Nathan, *The Law in Business Problems,* pp. 578-579. Professor Isaacs read the present chapter in manuscript and commented further at this point: "My work in the Harvard Graduate School of Business Administration convinces me more and more every day that we are dealing with legal devices that were never intended for the current needs to which they are being applied. The process of adaptation therefore is at least as important as the process of searching for the 'proper' legal apparatus for any given purpose. Naturally, a legal institution emerges from this process of adaptation and use very considerably modified. Your book contains material which strikingly illustrates this process."

freed from the necessity of active participation in the operations of the company itself. From the standpoint of management, too, it was necessary that stockholders be excluded from control over day-to-day operations under a scheme of delegation and centralization of control. Thus given a flexible and convenient method of raising and directing even the largest blocks of capital, it has been possible for such companies to keep fully up with or even to accelerate the march of scientific and engineering progress, to expand and develop markets to the utmost, and to secure the fullest benefits of specialization, division of labor, and the perfection of managerial skill.

The manner in which the corporation meets the needs of industrial, mercantile, transportation, and mining enterprises has caused it during recent years to approach rapidly to a position of dominance in these fields. To be sure, it has not done this without opposition, friction, or at times open resistance. There have been abuses, of course, and difficulties in adjustment of various interests to the triumphant advance of corporate growth. In the early days of this development, resistance took the form of a frontal attack on the whole system of corporate capitalism and efforts to substitute in its place some form of industrial democracy, socialism, communism, or what was styled "co-operation."

It is not part of our present task to examine why these movements have met with so little success,

but it will probably be granted that, in the United States at least, the conflict between corporate capital and the workers or between the "soulless corporation" and the suspicious public has now been quite completely diverted into other channels.[2] Reference should none the less be made to those early experiments under the name of "co-operation" in the industrial field, since they introduced and disseminated a practicable co-operative form which, though soon abandoned by labor and industrial interests, has been imitated, modified, and persistently developed along workable lines in the field of agriculture.

This shift of co-operative enterprise from industry to agriculture has been a matter of profound significance. For, whatever its triumphs in other fields of economic activity, the corporation has shown but little adaptability to the needs of the farming industry. On the other hand, as technical advance has been made in agriculture, as markets have widened, as greater commercialization has taken place, and as the capital needs of the business have increased, agriculture has found itself pressingly in need of a form of large-scale business organization. Farmers have reached out for a means of securing for their industry many of the same advantages that others have been deriving from the corporate form of organization, but with marked difference in details of

[2] Nourse, E. G., "The Economic Philosophy of Co-operation," *American Economic Review,* Vol. XII, p. 591.

structure and operation from those of the ordinary commercial corporation.

The present volume is devoted to the purpose of showing how this evolving institution, designed for the growing needs of farmers, is achieving a distinct legal status. It is not our task to present a detailed history of the growth of the co-operative movement or to discuss its actual achievements. Nor does the writer aspire to offer a manual of practice for the lawyer called into consultation on the affairs of co-operative associations. The aim is rather to secure an interpretation of the economic motives and objectives which have suggested, stimulated, and directed the fashioning of co-operative enterprises and demanded the recognition of these purposes in law. Our chief task is to examine the fundamental economic features of the co-operative philosophy of agricultural business for the purpose of seeing how adequately these have been incorporated into existing law, or how they might be more fully and satisfactorily worked out.

There is comparatively little in the written record of agricultural co-operation which sets forth explicitly the economic and social objectives which it has sought to attain. But implicitly the farmer has set forth and reiterated his desire for two general results: (1) a system of production and distribution of farm products more economical and efficient than present methods provide, and (2) a more equitable allocation of control of the system and the benefits

of its operation. Both these matters require detailed scrutiny.

I. ELIMINATING WASTE AND INCREASING EFFICIENCY

The farmer's quest for economy and efficiency has brought co-operative activity in three general fields: (1) operations of actual production; (2) the purchase of goods or services used either in carrying on his farm business or in household consumption; and (3) the selling of his product. From the economic point of view it is not possible to draw a clear line between the first and third of these items, since marketing frequently involves productive processes such as butter or cheese making, storage, packing, drying, conditioning, or other processes of kinds which sometimes are done on the farm but which may be done by a marketing organization or a subsidiary operated by it for the service of the grower members.

The progress of specialized scientific and machine-equipped agriculture has created a demand for co-operative enterprise in many of the basic processes of farming. "The modern farmer finds himself involved in a productive process which, if efficiency is to be secured, demands a variety and frequently a size of capital equipment in excess of the carrying capacity of the one-man farm and a labor specialization quite outside the scope of the individual farm personnel. To meet this emergency a whole host of co-operative associations organized along lines of

functional specialization have developed in the United States and to a much lesser extent in other countries. One of the earliest was the 'thresher ring,' which pooled capital contributions in such a way as to bring steam power to the ordinary small farm. We now have silo-filling and power-spraying organizations, cow-test associations, sire-owning groups, and even co-operative budding, pruning, picking, packing, fumigating enterprises and in several cases co-operative investigational work. A wide variety of specialists of high-grade trade or professional competence work for co-operative farm groups on a salary basis. All these cases embrace services which the producer is convinced he gets cheaper or better by providing them for himself on a co-operative basis, or in many cases which he could not get at all if he relied on the profit-seeking enterprise of outsiders." [3]

The farmer as consumer also has turned to co-operation. He has been dissatisfied with the prices charged and the service rendered by non-co-operative stores, banks, insurance companies, and other service agencies, and has thought that through co-operative organization he could supply himself with these consumer goods more efficiently and with greater economy. "The American farmer (and likewise his European brother) does a deal of joint buying, either through a co-operative store in his market town or, with better success, through his

[3] *ibid.*, pp. 581-582.

elevator or other shipping organization. This principle of co-operative supply extends to services as well as commodities and to social as well as purely economic requirements. Merely to list the farmers' telephone lines, farmers' insurance, community stock pavilions, laundries, ice-houses, recreation centers, movies, and the like shows the variety and vigor which co-operative organization manifests in bringing to the countryman facilities which would offer no inducement to profit-seeking private enterprise." [4]

Finally, marketing (with the incidental processing) has impressed the farmer as offering the greatest possibility of saving through co-operation. The wastes of competitive profit-seeking in this field have been the theme of endless rural discussion and have contributed more than any other influence to the breadth and persistence of the co-operative movement. "Says the farmer: 'Why should I support seven local livestock buyers scouring the country in cars such as I could not afford, each trying to get a little more than his share of a business that would economically occupy but one man? Since our stock will all be shipped from this station anyway, is it not wisdom to appoint a single agent who will arrange convenient shipping days when we shall drive in our stock and dispatch it to market with a minimum of effort and of time consumed?' Horticultural regions have in numerous instances organized and integrated the business of a whole

[4] *ibid.*, p. 582.

producing region into assembling, processing, distributive, and jobbing agencies of high efficiency. They have eliminated competitive wastes both at the local shipping point and at the central and jobbing markets. Furthermore, they are the instrumentalities of the producer and owner of the goods, and hence likely to be more aggressive in the effort to reduce expense and wastage in the handling process and to improve quality and enlarge outlets than is the middleman who works on a commission, assuming always that the association develops a practicable form of organization and is willing to pay for technical ability." [5]

If we examine these several situations from the standpoint of economy and efficiency, it appears that the possibilities of improvement which co-operation offers are four in number. (1) It proposes to avoid unnecessary duplication of equipment, solicitation, or promotional activities which do not increase business or improve service but simply affect its distribution between individuals or companies. (2) It promises to reduce effort or improve results by identifying the interest of the patron with the association which he (presumably) feels is there to serve rather than to exploit him. (3) It is designed to effect units of organization large enough to give bargaining skill and force. (4) This large-scale organization hopes to react through agencies of education or otherwise on the activities of the con-

[5] *ibid.*, pp. 580-581.

stituent members in such a way as to improve the adjustment of production to marketing and thus to stabilize the whole industry in which the group are engaged.

Space does not permit of adding to the illustrations of economy through avoidance of duplication of equipment or effort which have already been cited. The extent to which this can be effected through consolidation and integration of the work of many smaller units of operation is analogous to that found in other fields of commercial endeavor. Co-operatives are still in the process of experimenting to see how far and by what methods these results can be obtained.

The significance of a sense of personal participation as a means of improving the quality of business operations is constantly stressed by co-operatives and should be appreciated by students and the public. The consciousness that it is *their* business and that savings will redound to their advantage goes far toward removing the impersonal character of modern industrial and commercial relationships and toward unifying and utilizing the sense of solidarity of a large number of individuals engaged in a common line of production. The fact that producers associate themselves together to carry on their own business preserves or restores much of the personal incentive of private enterprise. The whole structure of the organization, with its local branches and representative directorship, facilitates

carrying back to the rank and file whatever suggestions as to changes in method may be derived from the experience of their employees, who are in contact with those buyers upon whose satisfaction they must rely for their prosperity. The whole movement for standardization, grading, and the stabilization of production depends primarily on bringing to the worker the best possible understanding of the complete process of which his labors form the initial step. This, co-operation is designed to do.[6]

The third gain from co-operation is supposed to be in an increase in bargaining efficiency and power which farmers expect to attain through co-operative organizations. "Collective bargaining," "orderly marketing," and "merchandising," as against "dumping," are the slogans around which most of the recent interest has been rallied. These phrases express a twofold belief: (1) that farmers need a selling organization which in size, and hence in both

[6] That they have been distinctly successful in this endeavor in many instances is a matter of common knowledge. For example, the co-operative creameries have improved conditions surrounding the production and handling of milk to such an extent that the federation of Minnesota co-operative creameries produces today a large volume of even-running, high-score, "sweet cream butter" superior to that produced by centralized or most other non-co-operative systems. The inability of private traders to stimulate producers to improve their product is notorious. For example, under the private trading system the quality of cotton produced in the South tended to become worse rather than better and to drift toward the production of "half and half," or short staple cotton of inferior quality. Today the state cotton associations are not only doing instructive grading and urging the production of the types which command the better prices, but are actively assisting this work through the distribution of seed of approved strains.

skill and strategic advantage, will be commensurate with the manufacturing, exporting, or consumer-buying agencies with which they must deal, and (2) that the seasonal character of their product and the speculative trading agencies which have grown up on the basis of this circumstance operate to lessen the farmers' return, a condition to be remedied only by a large-scale selling system capable of equalizing supplies in accordance with consumers' needs.

No attempt will be made here to pass judgment upon or even to analyze the nature of this economic reasoning.[7] Our present purpose is merely to discover as accurately as may be just what these "co-operators" have really been doing and why it was that certain forms and procedures have been demanded and, in a measure at least, secured. The desire for orderly marketing through collective selling agencies then has clearly required some scheme of organization not only larger than the individual farm, but larger also than the local shipping point. It aspires to cover not merely a regional producing area, but frequently becomes interstate in scope and even "national" in the sense of being a significant factor in central market places such as the New York Cotton Exchange, or with nationally powerful manufacturing concerns like the "big meat packers," the great textile and flour mills, and the four giant tobacco companies.

[7] The Institute has under way or projected several studies designed to test the value of specific efforts in this direction.

In this, the co-operative movement in agriculture simply represents an attempt of business organization in a small-scale industry to achieve for its members some of the advantages that the large corporation, the so-called trust, and the trade association have achieved in other commercial fields. This raises the issue of monopolistic tendencies and restraints upon trade or competition which have constituted the chief opposition to the passage of laws authorizing co-operative associations or to particular practices which co-operatives have developed in the process of their growth. This phase of the co-operative movement will be developed as the book proceeds.

The fourth objective of co-operation is a corollary of the third. Control, guidance, or, to use the most favorable term, "stabilization" of productive operations is closely tied up with large-scale collective bargaining in the sale of the product. Any very comprehensive attempt to improve returns by equalizing supplies between markets or from day to day or season to season inevitably finds itself confronted by the basic supply and demand ratio resulting from the scale of productive operations. If an industry is so to organize itself as to undertake some responsibility for the profitableness of prices under the law of averages, it is almost certain sooner or later to seek through positive control, moral suasion, or educational activity to adjust the flow of product from the producing plant in such

a way as to equate with market demands at the price level conceived to be necessary.

One of the important frontier questions of economic theory, commercial practice, and judicial approval today is how far this process of control or rationalization can safely be left to the activities of organized groups within our economic society, what powers may properly be given them, and what restraints must be placed around the exercise of these powers. The issue of co-operative organization in this regard is simply one segment of the general question of legislative and judicial control in our current economic society. It is hoped that the present volume will shed some light on this problem. Whatever tentative conclusions or points of view we may have to suggest must be based upon the historic and analytical material developed through the body of the book, and are set forth in the closing chapters.

Co-operation in its early and idealistic days took very high ground on the ethical question of relations with the public, and such views are still to be heard from many leaders in the movement. Co-operation was conceived as a means of introducing the Golden Rule into business. The "reform" aspect of the movement is to be seen not merely in its external or market relations, but also in its handling of the internal relationships of the association. This phase of the matter will be made the second division of our economic analysis.

II. EQUITABLE DISTRIBUTION OF CONTROL AND BENEFITS

As has already been suggested, it is possible to organize an economic system from the standpoint and for the benefit of either (1) the capitalist, (2) the wage worker, or (3) the patron. The capital stock corporation does the first; labor co-partnership [8] has at times attempted to do the second; and agricultural co-operation is gradually perfecting methods for doing the third.[9] The manner in which co-operating farmers have sought to work this out has been through the limitation of capital holdings, the restriction of voting privileges, the curtailment of dividends on stock, the return of earnings as a "patronage dividend," the confining of transactions to their co-operative organization, and finally the method of pooled sales with service charge deductions. The nature and evolution of these practices must be left to unfold as our study proceeds, but here a brief statement may be offered to show in general terms what it was that the co-operatives reacted against in the procedures of non-co-operative business and the modification of

[8] Sometimes also called "labor co-operation" or "producers' co-operation." Some reference to the movement and its relation to the farmer co-operative movement will be found in the following chapter (p. 27).

[9] This can be said also of the consumer co-operative movement. The present study, however, is not concerned with consumer co-operation, except as farmer stores and the joint buying of supplies comes into the story of predominantly productive and selling operations.

such practices which they sought to incorporate in their associations.

First, then, they wished to preclude concentration of control in the hands of individuals or small groups. Hence, they set a maximum on the amount of capital which could be held by one person and gave each member a limited voting power, frequently so strict as one vote per member and no proxies. Later, the non-stock association made control purely personal in the hands of qualified patron members and reduced capital entirely to the position of loan funds.

Second, they objected to profits as such, and therefore provided that invested capital should not receive more than a moderate interest—sometimes even less than the going rate. Any surplus above such payments which might accrue from operations was to go back to patrons on the basis of business done with the association. Recent developments, by restricting business to members and by pooling both proceeds and expenses, have sought to eradicate the profits element still more effectively.

The several propositions grouped under these two heads imply a purpose on the part of co-operators to socialize the economic interest of their particular group, to require an equitable assumption of responsibilities, and to assure equitable distribution of benefits. It has been visualized as "economic democracy" on lines of liberty, equality, and fraternity. The complexity of the problems arising as

a result of the attempt to carry these ideals into practice and the differences of opinion as to how they are to be reconciled with the practical demands of operating efficiency will appear at many points in subsequent chapters of the book.

Here we wish merely to reiterate the general proposition that, while the ordinary business corporation was developing such structures and practices as it conceived to be advantageous to itself,[10] elsewhere in our economic fabric other groups of people under other motives and circumstances were fashioning another pattern. Such groups, styling themselves co-operative, were trying to organize a naturally decentralized type of industry for the large-scale operations demanded in a scientific, commercialized, and capitalistic day,[11] while at the same time preserving the personal independence and dynamic element of individual participation and reward which seemed to be threatened under some forms of modern industrialization. Obviously the spirit of co-operation cannot be legislated into business, nor the equitable ideals of the Golden Rule made statutory law. But since there was a purpose to make such ideas effective in the economic world, it did become important that lawmakers should make suitable provisions to enable such arrangements to acquire dependable legal status and at

[10] Subject, of course, to such restraints as were put upon it from time to time by an alarmed or dissatisfied public sentiment.

[11] See Nourse, E. G., "The Revolution in Farming," *Yale Review*, October, 1918.

the same time remove such provisions of other laws as might operate as barriers to the carrying out of co-operative practices. We shall see as the book proceeds what were the several steps in these two directions which were required before the co-operative idea could at all adequately express itself.

CHAPTER II

INFORMAL BEGINNINGS AND THE ROCHDALE INFLUENCE

It has been suggested in the preceding chapter that co-operation is not some recently developed form of business organization, antedated by the capitalistic profit-seeking corporation. Rather, the two forms have been developing side by side, though at somewhat unequal rates of speed and in more or less mutually exclusive fields. Co-operation of a very informal sort has existed in agriculture from the beginning, and was in some regards distinctly favored or necessitated by the pioneer character of the industry. Leaving out of account the obvious forms of community collaboration, such as barn raisings and husking bees, there are to be found even in the meager records of early American agriculture evidences that commercial undertakings of a group character were not infrequently organized upon lines quite similar to what is today known as co-operation. For example, when settlers began to develop surplus production in the territory beyond the Alleghenies, remote from their seaboard consuming and exporting markets, they found

it advantageous to join their small individual products into somewhat large units for transportation over the mountains and, as we should say today, "pooled" both proceeds and expense.

The following quotation gives a hint of a movement which was doubtless somewhat widespread:

> The Miami Exporting Company, organized in 1803, had for its purpose the finding of a market for the agricultural products of the State. . . . While not a co-operative organization, it sought actively to enlist the support of the farmers and was made up both of them and of merchants. More nearly co-operative was the Licking Exporting Company, organized by the Welsh settlement at Granville in 1820. It was composed of farmers who associated together for the purpose of sending their produce to market. The first attempt was the marketing of hogs. These were put into the custody of representatives of the company and driven to Sandusky, where they were slaughtered, the pork being packed and shipped by boat to Montreal. An agent of the company went with the shipment to Canada to make the sales, where he realized $1.25 per hundredweight for the pork. Needless to say, the venture was not a profitable one, and it was not repeated. This attempt at business co-operation is the earliest in the State of which we have any account, and possessed most of the elements of ideal modern co-operation: (1) the product was brought together at the point of production; (2) it was transported economically; (3) it was uniformly handled and packed; (4) it was presumably sent to the best markets; (5) a representative of the company was at the point of sale. But in this case the "high cost of living" was not epidemic in Montreal, and the society did not have the courage to try it again.[1]

[1] Lloyd, W. A., Ohio Agricultural Experiment Station, *Bulletin No. 326*, p. 83.

I. CO-OPERATION AS A SCHEME OF ECONOMIC REFORM

The undertakings of a co-operative character among our agricultural pioneers were by no means reform proposals. They were not undertaken because of dissatisfaction with existing types of economic organization, but simply sprang up as almost necessary joint enterprises in a period before the ordinary commercial agencies had developed to serve the early settlers' needs. By the thirties, however, Co-operation with a capital letter first made its appearance in the towns, being there taken up as a means of alleviating the conditions of the trade workers.

From about 1836 on to the Civil War, experiments along co-operative lines were undertaken[2] by

[2] "When [1844 and 1845] the New England Working Men's Associations failed to shorten the hours of the factory system, the operatives turned to the idea of the Protective Union, or co-operation, as a means by which they could themselves improve their condition. . . . In England at this time the Rochdale co-operative system was entering a similar career of success. But there does not seem to have been any connection between the two movements; and their methods of business were wholly different. The Englishmen sold at market prices and divided the profits among the purchasers. The working men of New England wanted to abolish profits. They aimed to sell at cost. The Protective Unions exhibited a distinct class movement of working men to whom the idea of profits appeared as an injustice. They organized to protect their standard of living in the only way in which they could succeed in a period of falling prices, by eliminating all unnecessary expenses, and aiding each other in sickness and misfortune. . . . The organization of the New York Protective Union in 1847 marked the addition of a new principle to the Protective Union idea. The workers would not only eliminate the menace to their wages by doing away with [ ] but they would also employ themselves and thereby abolish the

groups of tailors, bookmakers, slaters, cabinet makers, journeymen cordwainers, hand-loom weavers, iron molders, and others. But in neither their producer nor their consumer activities were these co-operative enterprises of city labor conspicuously successful. Although "the whole trade-union movement of 1850 and the following year in New York, Boston, and Pittsburgh was permeated with the idea that co-operation offered the best mode of protection to workmen and the ultimate means of solution for the problems of labor, the revival of business activity during the years 1853-1854 brought forth a new type of union, now disdainfully called 'pure and simple,' by the radical socialist. It steered clear of all programs of social and political reforms and confined its activities to improving conditions in the trade. Its main weapon was the strike; its aim was to establish a minimum wage for the trade, and to maintain it by means of a closed shop." [3]

profits on their labor and assure themselves of steady employment. Strikes and the law had both failed to protect the workman. They would therefore eliminate the menace to their wages by doing away with the employing class." Commons and Andrews, *Documentary History of American Industrial Society,* Vol. VIII, pp. 214-215.

[3] *ibid.,* p. 216.

In the state convention of the Friends of Industrial Reform held in Boston in October, 1850 the following resolution was passed: "Resolved, that it is the duty, as well as the interest of working men, to form Mutual or Co-operating Labor Associations, in order to abolish, as far as they can, the system of wages slavery, a law ought to be enacted in this State, by which all such Associations can receive the advantages and benefits of incorporation, without the trouble and expense of obtaining a special enactment." *ibid.,* p. 329.

This first stirring of the co-operative movement in the United States did not leave behind any reminder of itself on the pages of our statute books. In the main, it preceded the period of general corporation laws, and the co-operative enterprises were authorized under special acts of the legislature or were conducted as mere unincorporated associations. In some cases these commercial activities were simply taken up by trades unions or other bodies "not organized for profit," as the phrase now runs. This latter situation has some significance for later parts of our discussion. Likewise, the agitators for the improvement of the condition of the laborer seldom made their definition sufficiently broad to include the agricultural worker,[4] and it appears that the participation of farmers directly was sought in few, if any, of these enterprises. The agricultural significance of the movement, therefore, is to be found in the publicity which it gave to the co-operative philosophy and the illustrations of actual

[4] However, a committee of the Boston Mechanics' and Laborers' Association, in January, 1845, said: "It is the belief of your committee that these objects can only be gained by Industrial Association, or union among the laboring classes. The direction and profits of industry must be kept in the hands of the producers. Laborers must own their own shops and factories; work their own stock, sell their own merchandise, and enjoy the fruits of their own toil. . . . In other words, all interests must be united, all trades combined, and all branches of usefulness be equally paid. The farmer, the manufacturer, the mechanic, and the merchant must belong to the same firm, and share the proceeds proportionally to the labor each has contributed. The country's wealth belongs to and must be given to the country's labor." *ibid.*, p. 264.

co-operative enterprise which it put before the farmer's eyes.

This was a matter of some importance because discontent with their economic lot and efforts to improve it were manifest also among farmers in the decade or more before the Civil War. Quite widespread dissatisfaction was felt with the way in which their class was faring in the general economic development of the country.[5] The first organized movement of protest, however, apparently did not occur until the year 1858. On September 15 of that year a convention of Illinois farmers met at Centralia to discuss grievances and to consider proposals for remedying these conditions. Their point of view may be seen in an excerpt from the platform which they adopted:

We believe that the time has come when the producing classes should assert, not only their independence, but

[5] "Dating from about the year 1848, there was a general feeling among the farmers throughout Illinois that they were not receiving the just reward of their labor. The country was settling up, and the cost of transporting produce to St. Louis and Chicago, the principal distributing points, over the common roads was so great that it left the farmer little or nothing to carry back to his family. The country villages were few and far between. Railroads had not been built, and it was with the greatest difficulty that the farmer could gather enough money to pay his taxes. The construction of railroads began, but before these were in operation a feeling of awakening had so grown upon the popular mind that Farmers' Clubs began organizing, though, at first, more to discuss matters of cultivation than anything else. In 1852 the exactions of the country merchants, or middle-men, as they were even then called, came in for a great share of the blame, and justly, beyond a doubt. They were the protected monopolists, who, by the force of their cohesion, controlled prices, and, while they grew rich themselves, oppressed the farmer." Periam, J., *The Groundswell,* 1874, pp. 202-204.

their supremacy; that non-producers cannot be relied upon as guarantees of fairness; and that laws enacted and administered by lawyers are not a true standard of popular sentiment. . . .

We believe that the producers of a commodity and the purchaser of it should together have more voice in fixing its price than he who simply carries it from one to the other . . .

We believe that the true method of guarding against commercial revulsions is to bring the producer and the consumer as near together as possible, thus diminishing the alarming number, and the more alarming power, of non-producers . . .

We believe that in union there is strength, and that in union alone can the necessarily isolated condition of farmers be so strengthened as to enable them to cope, on equal terms, with men whose callings are, in their very nature, a permanent and self-created combination of interests . . .

These truths we hold to be self-evident, that, as production both precedes barter and employs more labor and capital, it is more worthy the care and attention of governments and of individuals; that in the honorable transaction of a legitimate business there is no necessity for secret cost-marks; that, in all well-regulated communities, there should be the smallest possible number of non-producers that is necessary to the welfare of the human race; that labor and capital employed in agriculture should receive as much reward as labor and capital employed in any other pursuit; that, as the exchanger is merely an agent between the producer and consumer, he should not have a chief voice in the establishment of prices; that the interests of agriculture and of commerce can only be considered as identical when each has an equal share in regulating barter; and that the principal road to honor and distinction in this country should lead through productive industry.[6]

[6] *ibid.*, pp. 204-206.

The convention also adopted a "plan of operations," whose first and third items were "the formation of Farmers' Clubs wherever practicable, the object of which shall be to produce concert of action on all matters connected with their interests," and "the formation of wholesale purchasing and selling agencies in the great centers of commerce, so that producers may, in a great measure, have it in their power to save the profits of retailers." Probably some of these Farmers' Clubs had existed in Illinois and other states prior to the time of this convention. While primarily devoted, like other agricultural organizations at the time, to promotion of the arts of agricultural production, they also apparently undertook some commercial operations in the field both of buying and of selling.[7] The movement, however, did not attain any very great momentum prior to the Civil War. The war itself called for the exertion of every energy in the direction of increased

[7] "The grain dealers at the various shipping points were in disrepute as well as the railroads, and to cope with them the Dane County Farmers' Protective Union was organized [1857]. This 'Union' was directed against the grain buyers, but even if the charges were true it still appears that the railroad extortions were equally obnoxious. But even in its attacks upon the earlier of the two monopolies the farmers' union was an abject failure. An elevator was built at Madison and wheat was brought from all corners of the county and there stored in the custody of a man chosen to act as agent. The agent sold the wheat, pocketed the proceeds and took 'French leave.' The chagrined farmers hushed the matter up so that hardly a line relative to the matter appeared in print. The elevator burned down and the Farmers' Protective Union collapsed." Hibbard, B. H., "The History of Agriculture in Dane County, Wisconsin," University of Wisconsin, *Bulletin No. 101,* p. 141.

production, and at the same time resulted in a general advance of agricultural prices which caused the economic dissatisfaction of the pre-war period to fade into the background.

However, the homestead policy initiated practically at the beginning of the war period, the speculative fever which was fostered by war prices, and the railway boom which immediately followed the war united to create a condition which by the late sixties set the stage anew for widespread and more deep-seated agitation on the part of the farmers. Several conventions were held during the late sixties or early seventies, and from 1868 forward the Patrons of Husbandry (generally referred to as the Grange) developed a nation-wide agency through which this protest might organize itself for action. While the Grange had its political, social, and educational aspects, it also turned a considerable amount of attention toward economic problems and the commercial organization of the farmer. Numerous co-operative enterprises had sprung up locally in the late sixties or early seventies,[8] but

[8] "As a matter of fact, the very earliest of the farmers' elevators preceded the coming of the Grange and appeared to have sprung up spontaneously at a few towns where the farmers felt most keenly the need of a grain selling company of their own. The first of such attempts was made at Blairstown in 1867 or '68 and ran for only about two years, although a new company was established there in 1873. The first farmers' elevator for which incorporation papers were taken out was at Brooklyn, the county seat of Powesheik County. This elevator was incorporated in July, 1869, for $10,000 and was known as the 'Farmers' Union Elevator.' This was followed by the St. Ansgar Protective Association in 1871, although the latter was not incorporated until

from about 1872 forward these were rapidly augmented by, or absorbed into, the co-operative propaganda movement of the Grange.

It is not the purpose of the present volume to go into any discussion of the scope and achievements of these Grange activities. Suffice it to say that the number of organizations and volume of operations expanded enormously for two or three years and then declined with almost equal rapidity. Our concern is primarily to examine the principles upon which these activities were based and the legal status of the organizations so formed. As to the former, it would appear from the meager records that at the beginning no very distinctive co-operative practices were undertaken. Capital was frequently supplied under the ordinary stock-share plan, but also was frequently drawn from the dues or other funds of the Grange organization. In some cases the Grange commercial agency simply transmitted orders to the manufacturer or wholesaler or consigned produce to the terminal market. In other cases it bought and sold outright with the avowed intention of keeping margins down to a cost basis. Frequently, however, losses were incurred on such operations,

1873. By 1872 the Grange influence was definitely shown in the fact that four elevator companies were incorporated in that year, three of which indicated their Grange affiliation by the name which they adopted or by special features of their articles of incorporation. The title 'Patrons' Joint Stock Company' first appeared at this time, and was used frequently during the next five years." Nourse, E. G., "Fifty Years of Farmers' Elevators in Iowa," Iowa Agricultural Experiment Station, *Bulletin No. 211*, p. 236.

and these were paid sometimes out of the subscribed capital, sometimes from the treasury of the Grange, and sometimes were uncollected by those with whom they dealt.

No very definite or very successful plan of operation could be said to have developed during the early years of the movement. The first emergence of any settled policy came in 1875 when, at the annual convention of the National Grange of the Patrons of Husbandry, recommendations were formally adopted endorsing the "Rochdale principles" and urging commercial enterprises undertaken under Grange auspices to adopt this form of organization. While it was then too late for any scheme of organization to prevent the collapse of the movement, it does appear that the "Rochdale principles" were in this manner promulgated so widely as to have become somewhat familiar to farmers, particularly in the northeastern and mid-western sections of the country, so that when the movement was again revived this plan of organization was widely adopted and has been quite tenaciously held to in many sections down to the present time. It becomes, therefore, a matter of some importance to notice what were the ideas of organization included under the title "Rochdale principles." These were set forth by the Grange Convention of 1875 in the form of a set of "rules" for the guidance of prospective organizers. Their chief provisions may be summarized as follows:

Co-operative associations to be organized as stock companies with shares of $5 each.

Shares transferrable only to members of the association.

Ownership of one share or more to constitute membership in the association.

Each member required to sign the rules of the association.

Each member required to purchase at least $20 worth of goods from the association each year.

All members must be members also in good standing of the Patrons of Husbandry.

No member allowed to hold more than 100 shares of capital stock in the association.

All sales to be for cash.

Prices to be those prevailing in the community.

Interest on capital limited to 8 per cent (but maximum total to any individual limited in accordance with the amount of capital stock held by him).

Profits to go, after payment of interest and depreciation, "either to increase the capital or business of the association, or for any educational or provident purposes authorized by the association, and the remainder shall be divided among those who have purchased goods from this association during the preceding quarter (to non-members one-half the proportion of members), in proportion to the amount of purchases during the quarter.[9]

[9] See *Journal of Proceedings of the Ninth Session of the National Grange of the Patrons of Husbandry,* pp. 94-100. There was a provision that members in distress could withdraw all their capital above the sum of $5 at the discretion of the directors or any amount in excess of $25 on proper notice and with the consent of the directors. It was also provided that "should the directors have more money on hand than they can profitably invest in the business of this association, they shall have power to reduce the number of shares by purchasing such number of shares as may be necessary, at the rate of five dollars per share, together with interest thereon at the established rate since the last dividend of interest, the members having the greatest number of shares being the first required to sell."

It is evident that these "rules" had in mind primarily the operations of co-operative stores. They were, however, utilized also by Grange elevators and shipping associations. The latter were frequently organized on a county basis to ship various types of farm produce for their members. The only modification which was necessary to adapt the "rules" to their purposes was to provide for the purchase of such produce by the association from the shipping member at the prices prevailing in the neighborhood. This practice has become firmly established with most of the farmers' elevators, creameries, and similar organizations, particularly throughout the Middle West.

It should be observed in this connection that these principles of organization, however vigorously promulgated by an overhead organization or enthusiastically adopted by co-operators themselves, represented their own preferences as to the method by which their business should be carried on rather than being at the time embodied in any statutory enactment. As a matter of fact many, probably a majority, of the earlier Grange undertakings were not incorporated at all, but operated simply as voluntary associations. Where they did incorporate, it had in most instances to be done under the general corporation laws, since only four states had special co-operative statutes at the time.

This raises the question why a special statute was needed for associations desiring to operate under

the "Rochdale principles." Several reasons may be suggested. Such a modification would be definitely required in any state whose general corporation law specifically stipulated voting on the regular share basis,[10] or the distribution of profits in accordance with capital investment. Where general laws were silent on these points, the purpose in advocating a distinctively co-operative statute was not to avoid prohibitions of a general law, but to require specifically that the business be made to conform definitely to the "Rochdale principles." A second motive was probably the sentimental desire to provide positively for the use of the word "co-operative" in the title of such associations. Finally, there seems to have been a feeling that in this manner a certain amount of supervision and fostering care would be furnished by the state for organizations formed under such a special statute and that this would contribute to the prosperity and good management of these concerns.[11]

[10] Since in some cases such a provision has even been embodied in the state constitution (see footnote 15, p. 40, and footnote, p. 268), amendment of that instrument has in some cases been necessary to clear the ground for a co-operative statute.

[11] This idea seems to have been in the mind of the author of the following discussion, as indicated by the italicized passage. While the remainder of the quotation is not germane to the present issue, it is here included in the belief that it furnishes an interesting expression of the thought of the time.

"The formulation of suitable enactments must be left to the lawmakers, but any proper law should forbid any corporation from embodying the word co-operative in its name and all real co-operative companies should be obliged to assume that name, unless the following conditions, in addition to many others, are complied with: No one to hold but a limited number of shares

II. THE FIRST CO-OPERATIVE STATUTES

In view of the questions raised it is interesting to examine these early laws to see just what they did provide. All were rather brief, and the modifications which they introduced into general corporation laws were surprisingly slight. The first of such laws was passed in Michigan in 1865 [12] under the title, "An Act to authorize the formation of mechanics' and laboring men's Co-operative Associations." It was clearly designed for the organization of co-operative stores, but in 1875 was amended to include agricultural and horticultural associations. It authorized capitalization of $5,000 to $500,000, divided into shares of $5 to $10 each. Its most distinctive provision read: "Said associations may, either in their articles of association or by by-laws for that purpose to be adopted, regulate the number of shares which any one subscriber may take and hold

of small amounts, and to have an equal vote with every other stockholder; business, if distributive, to be on the Rochdale plan, or at least embody such features of it as strictly cash trade and dividends on sales, and, if productive, all the employees who have been at work continuously for six months to receive such reward as the by-laws might determine; but at all events labor to receive some share of the profits, or to be obliged, after a reasonable time, to own some of the stock; *and full reports at regular stated intervals to the Secretary of State, who should publish these in pamphlet form to be circulated as a public document.*" Bemis, E. W., *Co-operation in the Middle States,* Johns Hopkins University Studies, Vol. VI, 1888, p. 166.

[12] There had been a mutual or co-operative fire insurance law on the statute book of New York since 1857, and mutual companies chartered by special act at least 20 years earlier. See Bartlett, R. W., "The Organization and Development of Co-operative Fire Insurance Companies in New York," Cornell Agricultural Experiment Station, *Bulletin No. 435.*

. . . the mode of voting thereon . . . the mode of awarding, declaring, and paying dividends." [13]

A measure destined to have greater influence than the above statute appeared in 1866 when Massachusetts passed the second co-operative law [14] in the United States. This was a statute drawn on somewhat broader lines and with more specific provisions governing co-operative procedure than were set forth in the Michigan Act. As this law was taken as a pattern by several other states,[15] its chief features will be set forth in full:

Section 1. Seven or more persons of lawful age, inhabitants of this state, may, by written articles of agreement, associate themselves together for the purpose of trade, or for carrying on any lawful mechanical, manufacturing, or agricultural business within this state, and when such articles of association shall have been executed

[13] *Laws of Michigan,* 1865, Act No. 288.

[14] *Acts of the General Court of Massachusetts,* 1866, Chapter 290.

[15] Pennsylvania (1868), Minnesota (1870), Connecticut (1875). New Jersey also took action in 1875, but by that law merely permitted co-operative stores to be incorporated under the general corporation law of 1849. By an act of 1881 (revamped in 1884) a special statute was provided "for the formation and regulation of co-operative societies of workingmen." This was designed primarily for store associations, but set forth co-operative principles as had not been done before in the state. In 1884 also, Ohio provided for "one-man-one-vote" associations with stock holdings limited to $1,000 per individual and authorized by-laws making such provision as desired for the distribution of earnings to patrons and others. In 1878 California enacted a brief law which permitted the formation of "co-operative business corporations for doing any lawful business, and dividing a portion of their profits among persons other than their stockholders." This law also provided that such associations might regulate "the number of votes to which each stockholder is entitled." This clause conflicted with a provision of the state constitution, which was forthwith amended.

and recorded in the office of the clerk of the city or town in which the business is to be carried on, such persons shall be and become a corporation, and enjoy all the powers and privileges, and be subject to all the duties, restrictions, and liabilities set forth in all general laws in relation to similar corporations, except so far as the same may be limited or enlarged by this act. . . .

Section 5. The amount of capital stock of such association shall be fixed and limited in its articles of association, and may be any sum not exceeding fifty thousand dollars. The association may increase or diminish its amount, and its number of shares at any meeting of its stockholders . . .

Section 7. Such association may take, hold and convey such real and personal estate as is necessary for the purpose of its organization, and may sue and be sued in its associate name, and no member thereof shall be entitled to hold or claim any interest therein exceeding the sum of one thousand dollars, nor shall any member, upon any subject, be entitled to more than one vote.

Section 8. No certificate of shares shall be issued to any person until the full amount thereof shall have been paid in cash. No person shall be allowed to become a shareholder in such association except by the consent of the managers of the same . . .

Section 11. No shareholder shall be personally liable for any debt of the association after the full amount of the capital stock is paid in and certificate issued therefor.

Section 12. There shall be such distribution of the profits or earnings of such association among the workmen, purchasers, and stockholders, as shall be described by the by-laws, at such time therein prescribed, and as often at least as once in twelve months. Provided: That no distribution shall be declared and paid until a sum equal, at least, to ten per cent of the net profits shall be appropriated for a contingent or sinking fund, until there shall have accumulated a sum equal to thirty per cent in excess of such capital stock.

The year 1887 saw three more co-operative laws enacted, two of them in states which previously had had no law of this sort. The Wisconsin Act of 1887 [16] differed in form but not much in intent from the above laws. It provided for carrying on "any trade or business" on the "mutual, reciprocal, or co-operative plan," and required that no member should hold more than one office at a given time. It had a limited liability provision, required sales to non-members to be for cash, and provided that one association might own shares in other similar associations, but that such holdings might not exceed a one-third interest, nor might the owner associations have more than one vote. There was also a provision that "never under any circumstances" might the association contract debts in excess of two-thirds of its paid-up capital. Its voting clause said: "Members and not shares of stock shall vote in electing officers and transacting any business of the association of whatsoever nature, but no proxies shall be allowed." The Kansas law of the same year [17] was "for the purpose and to the end of more successfully promoting and conducting any industrial pursuit." The "one-man-one-vote" provision was its only feature—a brief and very inadequate law. The new Pennsylvania law of 1887, on the other hand, was a detailed document of eleven pages, embodying the general features of limited voting, patronage divi-

[16] *Laws of Wisconsin,* 1887, Chapter 126.
[17] *Kansas Session Law of 1887,* Chapter 116.

dends, trade for cash, and the like. But it also had a novel provision of "permanent" and "ordinary" stock which bears some resemblance to certain modern financial devices, and was based on the sound idea that every member should have a permanent investment in the capital of the association. "Ordinary" stock could be bought and sold, but "permanent" stock running up to a maximum of $1,000 and conferring one vote on the holder must remain undisturbed as long as one was a member. Patronage dividends were to be applied to payment for this stock until the $1,000 maximum was reached.

III. LAWS OF THE WISCONSIN AND NEBRASKA TYPES

In spite of the interest of the Grange and subsequent farm organizations in co-operative marketing and the growth of farmers' elevators, co-operative creameries, and various forms of shipping associations from the seventies forward, it was not until 1911 that farmers really took the lead in any widespread movement to secure laws under which such organizations could be most advantageously set up and operated. They had, to be sure, availed themselves to some extent of the earlier legislation originated by non-agricultural groups. In a few instances also they had been instrumental in having the formation of agricultural societies included as one of the purposes of such statutes as were passed. But even so, the older laws were mainly the work of consumer or workman co-operative groups. The

Farmers' Alliance had in 1895 been influential in securing a co-operative law in California.[18] This was part of a distinctive but, for the time being, quite local movement.[19] We shall discuss this in detail in Chapter III, but first must set forth the more general movement for co-operative laws of the Rochdale pattern which developed actively after 1911. This latter may properly be described as the conservative phase of the modern legislative development. Only after examining it with some care shall we have a proper basis for comparison with the more radical departures discussed in subsequent chapters.

We have noticed that Minnesota in 1870 passed a law of the same general character as the Massachusetts law of 1866. This was amended in minor particulars in 1881, and in 1897 the growth of the co-operative creamery movement was definitely evidenced by the passing of an additional statute, providing for creamery associations[20] (*General Laws of Minnesota,* 1897, Chapter 351). In 1899 there was a further amendment (*General Laws of Minne-*

[18] Professor Ira B. Cross is authority for this statement of the origin of the law (*American Economic Review,* Vol. I, p. 537). He states the year incorrectly as 1894.

In 1895 Montana also passed a co-operative law providing for stock companies somewhat after the pattern of the Minnesota and Wisconsin laws.

[19] There was another distinctive local movement of a different type in the case of the Kentucky pooling law of 1906, which will be discussed in a later chapter (p. 159).

[20] In a similar way the Minnesota law of 1905 reflects the development of co-operative rural telephone companies. Michigan in 1899 passed a statute limited in its terms to fruit growers.

sota, 1899, Chapter 217) providing that the stockholders might petition for the dissolution of a co-operative association which for five years should have failed to declare a dividend upon its capital.[21] This provision, and another one relating to the federation of co-operative associations, passed in 1905 and further elaborated in 1907 and 1909 (see page 126), are to be found also in the Wisconsin law of 1911. This seems to indicate that Minnesota co-operators were distinct pioneers in this field of legislation, even though it was the Wisconsin statute of 1911 which was used most widely as a pattern in other states.

[21] This provision reflects the conflict of interest between the patron and the contributor of capital stock. It might seem rather anomalous for co-operatives, if their economic philosophy constituted an attack upon the system of profits on stock, to require the dissolution of a company simply because it failed to make and distribute such profits during a five-year period. The history of the provision seems to be that many of the patron members were prone to limit themselves to the minimum contribution of capital and then to vote the distribution of all earnings of the company as patronage dividends or to secure the adoption of a price policy which would leave nothing to be distributed either as patronage or stock dividends. This tended to leave those who had assumed the burden of larger capital contributions without even the going rate of interest on their invested capital. As a long-run proposition this would so penalize the stockholder as to make it difficult or impossible to provide sufficient funds for the equipping and operating of the companies, and thus led to the amendment in question. At best, however, it is a somewhat clumsy method of meeting the difficulty. It attained wide vogue as a result of the copying of the Wisconsin law of 1911 by a considerable number of states in subsequent years. When, however, Mr. Alvin C. Reis, Assistant Attorney-General for the state of Wisconsin, redrafted their co-operative statute in 1921 this provision was eliminated as being essentially inconsistent with the non-profit ideas of co-operation. Elsewhere it appears not to have been challenged.

In that year the American Society of Equity and the Right Relationship League [22] secured the passage of a law by the Wisconsin legislature which has been widely copied by other states and has exerted considerable influence on the present co-operative movement. (For full text of the law see Appendix A.) The only new features that it added to co-operative legislation as already worked out in Minnesota were a voting-by-mail clause and a specific provision for the distribution of earnings on the patronage dividend basis. Up to this time co-operative laws had simply permitted associations to make such by-law provisions as they might see fit concerning the distribution of dividends.[23] This clause of the Wisconsin law of 1911 read as follows:

> The directors, subject to revisions by the association at any general or special meeting, shall apportion the earnings by first paying dividends on the paid-up capital stock not exceeding 6 per cent [24] per annum, then setting aside not less than 10 per cent of the net profits for a reserve fund, until an amount has accumulated in said reserve fund equal to 30 per cent, but when recommended by the directors and voted upon by a majority of the stockholders at an annual meeting or a special meeting for that purpose the same may be increased to 100 per cent of the paid-up capital stock, and 5 per cent thereof

[22] See *Wisconsin Equity News*, June 25, 1911.

[23] This law was copied verbatim, or with slight changes, in Michigan, Minnesota, South Dakota, New York, Kansas, Washington, and Massachusetts in 1913; Virginia in 1914; Iowa, Wyoming, North Carolina, South Carolina, and Oregon in 1915; Rhode Island in 1916; Kentucky in 1918; and Oklahoma in 1919.

[24] This rate was subsequently raised to 8 per cent, and that has been the prevailing rate adopted by states which have copied the Wisconsin law. In a few cases it has been raised to 10 per cent.

for an educational fund to be used in teaching co-operation, and the remainder of said net profits by uniform dividend upon the amount of purchases of shareholders and upon the wages and salaries of employes, and one-half of such uniform dividend to non-shareholders on the amount of their purchases, which may be credited to the account of such non-shareholders on account of capital stock of the association; but in productive associations, such as creameries, canneries, elevators, factories, and the like, dividends shall be on raw material delivered instead of on goods purchased. In case the association is both a selling and a productive concern, the dividends may be on both raw material delivered and on goods purchased by patrons.

In the same year in which this Wisconsin law was passed (1911) a substantially similar, though briefer and less mandatory, law was passed in Nebraska in response to the efforts of the Farmers' Grain and Livestock Association of that state. This law [25] has the merit of containing a definition of co-operation (though a somewhat inadequate one), whereas previous laws had employed the term without defining it and without specifying very fully the practices which should characterize a co-operative association. The Nebraska definition lays down only one requirement, namely, that it "authorize the distribution of its earnings in part or wholly on the basis of, or in proportion to, the property bought from or sold to members, or of labor performed, or other service rendered to the corporation." The distinctive powers given the association were "to regu-

[25] *Laws of Nebraska,* 1911, Chapter 32.

late and limit the right of stockholders to transfer their stock" and to provide in its by-laws "the terms and limitations of stock ownership and for the distribution of its earnings." This law also had some vogue in other states, being copied by Indiana and Colorado in 1913, North Dakota in 1915, and Florida in 1917.[26]

It will be observed that the Wisconsin law gives specific recognition to the three co-operative fundamentals identified with the Rochdale movement, namely, limitation of capital holding,[27] democratic voting, and dividends on patronage, while laws of the Nebraska type insist only on the last one of these, though giving the association formed thereunder the right to adopt additional co-operative features should they so desire.[28] These are the pro-

[26] Through several original or amendatory acts passed in 1915 and 1917, Missouri, Illinois, and Montana also joined the list of states having co-operative laws of the general Rochdale type. These three states, however, could hardly be considered to have copied either the Wisconsin or the Nebraska statute.

[27] The $1,000 limitation prevailed quite widely as a result of the extensive copying of the Wisconsin law. It has been found in practice to impede the efforts of a co-operative stock company to raise adequate capital and was dropped from the Wisconsin law when it was redrafted in 1921. In the same year Iowa raised the limit to $5,000, and similar changes have been made in other states. It may well be asked whether there is any good reason for limiting a man's capital contribution, provided the law restricts him to a single vote.

[28] Considerable light is shed on this permissive rather than mandatory character of the law by a letter from Mr. Cuthbert Vincent to the present writer:

"There was no law authorizing co-operative effort in Nebraska when I drafted the bill in 1911. I would have made it stronger if I had not doubted the possibility of securing the passage of a stronger law. I drafted several bills and finally abandoned all of

visions to regulate transfer of stock, limit its ownership, and provide for the distribution of earnings, which are quoted above.

That laws of this sort go about as far as does the desire of a large number of co-operatives in the United States is evidenced by the fact that these laws are being retained on the statute books even of several states which have subsequently enacted more thorough-going co-operative statutes.[29] This raises the question whether we are to regard co-operation merely as a somewhat different way of conducting the affairs of a corporation, the precise terms being left to each company to determine for itself and to modify from time to time as it sees fit; or whether certain definite standards shall be set up to embody certain specific doctrines of co-operation as a distinct method of conducting business, and whether these must be made compulsory in order to keep the line between the two business forms clear. Are laws of the Massachusetts, Wis-

them except this one, for the reason that I was fearful that in drafting a new law, the opponents would take the measure in court, and would delay its operation, if not have it declared unconstitutional. In order to avoid the possibility of such a disaster, I finally adopted the method of copying the old corporation law that had been on the books for many years, and had stood the test of many court decisions, and then made a specific definition to the term 'co-operation' in the title of the Act, and added two clauses to the enabling section."

[29] Compare the Colorado laws of 1913 and 1915, the California laws of 1878, 1895, and 1909. In Florida the Nebraska law was adopted in 1917, though a non-stock law of the California type had been on the books since 1909. Many states have recently adopted the "commodity marketing" act (see Chapter V) without repealing their Rochdale co-operative statute.

consin, and Nebraska types mere hybrids, authorizing what are in fact still profit-making corporations, to which is added merely a partially co-operative restriction on stock-holding and profit distribution? We shall see in the following chapter that certain other principles than those of the Rochdale school have more recently been advocated as necessary to "pure" co-operation.

CHAPTER III

THE EMERGENCE OF THE NON-STOCK ASSOCIATION

REFERENCE has been made in the preceding discussion to the fact that the dominant type of co-operative legislation up to a period less than ten years ago had attempted merely to modify somewhat the ordinary corporate structure and procedures in order to secure a more democratic distribution of control and to identify earnings with patronage rather than with the contribution of capital. Such laws (the Rochdale pattern) proceeded on the theory that prices to the co-operating member should be those established competitively in the local market, thereby permitting the accumulation of capital from current operations of the business and causing the patron member to visualize and measure the financial benefits which accrue to him from his transactions with his co-operative company.

In all this it is apparent that neither profits as such nor capital as such were eliminated. Neither would negative profits, that is, losses, be precluded, and the losses incurred on the transactions with cer-

tain members would be recouped from gains upon others or be made good out of the contributed capital. In particular, where the company dealt with non-members as well as members, there would be profits (or losses) resulting from operations with this outside public which would make the returns of the member patron either larger or smaller, as the case might be, as a result of his membership in the so-called co-operative group. Many people therefore have been disposed to view this type of company as simply a modified form of the ordinary profit-seeking corporation, employing a particular scheme of profit sharing. They feel that this does not meet fully the needs of the situation, but that a more suitable structure might be devised through which to carry out the economic purpose of "service at cost."

I. THREE OBJECTIVES OF RECENT LEGISLATION

The general objectives of such critics were three in number: (1) avoidance of capital stock by putting all invested capital on the loan basis; (2) elimination of the competitive-price relation with the member and the substitution therefor of a "net-returns" settlement; [1] and (3) restriction of transactions to members,[2] this membership being based upon personal qualifications and the assumption of

[1] That is, remitting to him, after sale, just what his individual product brought, less costs of handling, or his pro rata portion of the proceeds of pool sales. (See Chapter VII.)

[2] See p. 255 for recent developments in this connection.

definite responsibilities as a condition to claiming the common benefits of the association.

Throughout the Rochdale period membership was identified with the ownership of capital stock, and restrictions were placed on the transferability of such stock certificates. This practice has the merit of emphasizing the co-operative principle that contribution of permanently invested capital is one of the obligations of the member in the co-operative association. It has, however, two distinctive drawbacks. In the first place, since it makes the amount of stock purchased (between the minimum and maximum limits) a matter of personal choice, it has been responsible in no small degree for the under-capitalization of farmers' elevators and similar co-operative enterprises. In the second place, it has tended to perpetuate the ordinary corporation idea that capital stock is the primary claimant to benefits from the operations of the organization and to make the payment of a rate high enough to attract investors the chief concern of the business management.

Numerous modifications of the capital stock idea have been introduced both before and since the coming of non-stock laws. Such modifications have concerned the issuing of common and preferred stock, voting and non-voting stock, Class A and Class B stock, or the "permanent" and "ordinary" stock of the Pennsylvania law of 1887. Against all such attempts to provide an effective means of

capitalizing co-operative undertakings, the advocates of the non-stock type of law propose the single principle that voting control shall be put on the basis of personal membership and that all invested capital, whether derived from within the membership or without, shall be regarded merely as loan funds. As we shall see later, the device upon which they place their chief reliance as a means of securing necessary fixed capital is that of making levies in proportion to the amount of business done, rather than through the lure of an attractive interest rate.[3] Whatever its underlying philosophy, and whatever its feasibility from the practical stand-

[3] Likewise the newer type of co-operative organization makes a more clear-cut separation between marketing organizations as such and the processing plants used with them. It is in connection with the latter that the principal demand for fixed capital arises, and it is therefore common for present-day commodity groups to organize a non-stock marketing association and a capital stock subsidiary warehouse or processing plant on the ordinary capital stock plan. The subsidiary then operates under contracts with the selling association to perform the necessary storage, packing, or other processes for a service charge sufficient to pay current returns on the invested capital.

Since the producer group themselves own the product to be handled and turn it over to the selling association, this obviates the need which an ordinary mercantile concern operating in the same field has for working capital. Or, as it is sometimes stated, the product itself acts as capital for a producer selling organization.

There is, of course, no inherent reason why a co-operative group should not contribute as much capital to a non-stock association in exchange for certificates of indebtedness as to a stock association in exchange for capital shares. The use of the subsidiary corporation, however, does provide a convenient way of attracting permanent capital from the investing public for providing storage and processing equipment without running the risk of giving outsiders control over the marketing process and policy.

point,[4] this non-stock scheme of organization has given rise to a distinctive type of co-operative legislation.

Second, in turning away from the stock form of organization, co-operation after this new pattern attempts to eliminate all profits either positive or negative by carrying on the business of members for a service charge, either levied uniformly upon each unit of product handled or at differential rates based upon actual service rendered.[5] That is, it acts as the selling representative of the producer or as the selling department of the producing group, rather than a trader dealing with them.[6]

[4] Obviously the position of the member who advances money as a loan is better than that of one who purchases stock. He has a stronger claim on the assets of the association, particularly in case of liquidation, since creditors must be discharged before stockholders' claims may be adjusted.

[5] The difference in these two methods will be set forth more fully in Chapter VII, which deals with the different methods of co-operative pooling.

[6] This is the essential relationship even in the case where the "sale and resale" type of contract is used. (See Chapter VIII.)

It might be mentioned also that frequently in states where no co-operative law had been passed it was found that a law designed originally for the incorporation of cemetery associations provided a fairly acceptable means of securing capital and carrying on business in an essentially co-operative spirit. These "graveyard laws" have thus been a sort of half-way house in the journey toward non-profit association laws in several states, and indeed are sometimes still resorted to in states now having detailed co-operative laws.

Many states also have had laws providing for agricultural and horticultural associations of a non-profit type. These were originally intended to be educational in their character and to stimulate better technical practices in agriculture. In default of suitable laws providing for commercial associations of the non-profit type, it has frequently been found possible to organize associations under these old "agricultural improvement" statutes and yet permit them to engage in commercial operations. Such

A third element which has come into co-operative practice along with laws of the non-stock type has to do with the restriction of the association to dealings with members only.[7] This has in part reflected a theory that dealings with non-members inevitably entail a certain element of profit (or loss) which would cause the member's return to represent something other than the absolute net price of his product. Aside, however, from this theoretical consideration, there has unquestionably been a practical intention of delimiting sharply the group whose common interests were to be advanced by the operations of the association and the desire to have control over their individual actions or individual product. The understanding of this issue requires a careful examination of the whole philosophy of "commodity marketing." This must be deferred until Chapter V, but meanwhile we can examine the evolution of this personal membership type of association through the earlier laws in which it was being tentatively developed.

The development of the purely membership type of organization reflects what may be called the "fraternal" idea—recognition of a joint group interest arising from common participation in some particular type of economic enterprise. It may be

adaptations, however, are at best cumbersome and likely to prove inadequate.

[7] Though not made mandatory in all such laws nor carried out in practice by all associations of the non-stock type. See pp. 106 and 255.

suggested in this connection that co-operative activities in England had first to be conducted under various Friendly Society Acts, the idea apparently being that the co-operative store was simply a device for accumulating small savings and applying them to the purchase of domestic supplies at the lowest possible price.[8] From time to time co-operative undertakings in this country have resulted from an expansion of the activities of social and occupational organizations, such as trade unions, farmers' clubs, granges, and the like. Experience has proved that for business efficiency it is distinctly better to organize commercial activities on a separate footing, but this does not necessarily mean that such independent commercial organizations could not combine this ideal of operating efficiency with the co-operative spirit of business most effectively by retaining the idea of personal membership. Such an arrangement emphasizes the solidarity of a particular group engaged in a given line of economic endeavor and seeks to garner and use the dynamic value which resides in such personal participation.

We shall have occasion, as our discussion proceeds, to attempt some critical analysis of this aspect of the newer type of co-operative legislation. At the present moment all that we need to say is

[8] "The Act of 1846 gave legal recognition to 'Friendly societies formed for the frugal investment of the savings of their members, for better enabling them to purchase food, firing, clothes or other necessaries, or the tools or other implements of their trade or calling, or to provide for the education of their children or kindred.'" Fay, C. R., *Co-operation at Home and Abroad*, p. 278.

that, from one source or another, there has come definitely into the evolution of our co-operative law this fraternal or group-interest element,[9] and it has given us a particular type of co-operative organization, which over a period of years has resulted in putting a somewhat distinct type of statute on the books.[10] Apparently there are three independent sources from which this type of co-operative thought came into the stream of our legislation, namely, the California law of 1895, the Alabama law of 1909, and the Texas law of 1917.

[9] Apparently this general idea was present also in the minds of the earlier industrial-labor and consumer co-operatives. At all events, the Massachusetts law of 1866 and others drafted in imitation of it contained the provision "no person is allowed to become a shareholder in such association except by the consent of the managers of the same." This provision continued in the co-operative laws of Minnesota and was successfully defended before the Supreme Court in 1907 (115 Minn. 451). In this and similar instances, however, the purpose was (compare 142 Ia. 621) primarily to prevent the entrance of an outsider into the company with the intention of getting damaging information, such as the names of wholesalers who dealt with the co-operative company. (See p. 269.)

[10] How foreign it was to the established idea is shown in a quotation from a standard text on corporation law. "For practical purposes, private corporations are of two descriptions; those having a capital stock and those having none. The former are business corporations; the latter include associations for all other purposes that may be carried on under corporate form. In the stock company the distinctive purpose is commercial; its members are the holders, for the time being, of transferable shares of its capital stock—the stake upon which it does business. In the non-stock company the distinctive purpose is more or less social; membership depends upon election, *and the members owe to the corporate body duties, such as loyalty and good behavior, which do not exist in the relations of a shareholder to a business corporation.*" France, J. C., *Elements of Corporation Law,* p. 22. (The italics are ours.)

II. THE CALIFORNIA LAWS OF 1895 AND 1909

The California non-stock law of 1895 marked a distinct new departure in co-operative legislation in America. It was a rather radical measure, and suggests that the ideas of some fraternal organization of agricultural workers had a distinct influence in its drafting. While it is impossible after the lapse of 30 years to ascertain definitely the precise character of such influence, the Farmers' Alliance is supposed to have been active in the formulation of this law.[11] The fraternal idea is shown in the following passages:

> In such association the rights and interests of all members are equal, and no member can have or acquire a greater interest therein than any other member has. At every election held pursuant to the bylaws each member must be entitled to cast one vote and no more. All persons above the age of eighteen years, regardless of sex, are eligible to membership, if otherwise qualified and elected as the by-laws may provide.
>
> Such association may, by its by-laws, provide for the . . . mode and manner of succession of membership, and the qualifications for membership, and on what conditions, and when membership must cease, and the mode and manner of expulsion of a member, subject to the right of an expelled member to have the board of directors appraise his interest in the association in either money, property, or labor so awarded him paid, or delivered, or performed within forty days after expulsion; the amount of membership fee, and the dues, install-

[11] Compare footnote 18, p. 44. Mr. Aaron Sapiro writes the author: "David Lubin told me he had much to do with framing and passing this law." For the significance of this connection see p. 94.

ments, or labor which each member must be required to pay or perform, if any, and the manner of collection or enforcement, and for forfeiting or selling of membership interest for non-payment or non-performance; the method, time, and manner of permitting the withdrawal of a member, if at all, and how his interest must be ascertained, either in money or property . . .

This requirement that the interest of all members shall be equal is the most drastic which has appeared at any time in co-operative legislation in the United States, and evidently has proven itself totally unsuitable for general application to associations organized for commercial purposes. At all events, the California law did enunciate clearly the principle that membership is personal, and that the association shall control the admission of members and the contributions that they shall make to its support. This principle has apparently found permanent root in co-operative law and practice in this country, as will appear at many subsequent points in our discussion.[12] The rather crude provisions covering this point in the law of 1895 were devel-

[12] It is not intended to imply that co-operative associations do, or probably could, put membership on an arbitrary personal basis like that of an exclusive club or similar social organization. It does, however, mean that the association can lay down qualifications for admission and make general rules, most important of which is the limitation of membership to persons directly interested by reason of being actively engaged in the production of the commodity to be handled by the association.

Furthermore, while it would be improper and probably illegal to "blackball" prospective members for purely personal reasons or expel old members in a similar manner, it is important that unsuitable elements be kept out, or put out, when known to be unable or unwilling to participate helpfully in forwarding the mutual interests of the association. (Compare Chapter XII.)

oped and moderated in the subsequent California law passed in 1909,[13] which says:

> Three or more persons engaged in the production, preserving, drying, packing, shipping, or marketing of agricultural, viticultural or horticultural products, or all of them, may form a non-profit co-operative association under the provisions of this title . . .
>
> Such association shall not have a capital stock, and its business shall not be carried on for profits. Any person or any number of persons, in addition to the original incorporators, may become members of such association, upon such terms and conditions as to membership, and subject to such rules and regulations as to their, and each of their, contract and other rights and liabilities between it and the member, as the said association shall provide in its by-laws. The association shall issue a certificate of membership to each member, but the said membership, or the said certificate thereof, shall not be assigned by a member to any other person, nor shall the assigns thereof be entitled to membership in the association, or to any property rights or interest therein.

To this were added provisions covering admission and expulsion similar to those found in the law of 1895.

These laws represent a distinct departure from the structure developed under the Rochdale movement. The membership clause just quoted shows that instead of a "company" of stockholders the idea becomes that of an "association" of persons engaged in a like undertaking, specifically qualifying for membership and accepting the discipline of

[13] *Statutes of California,* 1909, Chapter 26. For full text see Appendix B.

the association. Nothing, however, was contained even in the law of 1909 which was designed to give special statutory force to such contractual relations as might be established between a co-operative association and its individual members. It is true, of course, that from a relatively early date contracts were employed by agricultural marketing associations organized in California under these laws. The validity of such contracts, however, depended upon general principles of contract law, since there were not in the statute under which the co-operative associations were organized any specific provisions covering membership agreements.

Nor was there anything in the law of 1895 or that of 1909 which limited the association to transactions with its members, or set a maximum upon the amount of business which might be transacted with non-members. Even the second law was general in its terms, permitting the association to govern itself in such ways as it might find expedient. In practice the typical association which developed under the California law did show a marked tendency to insist on a contract with the member and to limit its dealings to those who would accept this contractual membership relation.

The law of 1895 provides for "a co-operative association for the transaction of any business, whether for profit or not, or for the promotion of any educational, industrial, benevolent, social, or political purpose." It seems clear that the thought

here was to provide for both non-commercial and commercial associations and to refer to the latter as organized for profit regardless of the manner in which their business might be conducted. This has been a persistent attitude of the law. By the time that the statute of 1909 was passed, however, the distinctive character of associations organized for the mutual benefit of participating members was more clearly recognized, and this law provides for "non-profit co-operative associations."

Whereas the California law of 1895 followed the Rochdale principle of equal suffrage, the statute of 1909 made a distinct departure by providing that the articles of incorporation shall set forth, among other things, "whether the voting power and the property rights and interest of each member shall be equal or unequal, and if unequal the article shall set forth a general rule or rules applicable to all members by which the voting power and the property rights and interests, respectively, of each member may and shall be determined and fixed." Under this provision it is possible to permit members to vote in proportion to the number of acres, trees, producing animals, volume of product, or whatever other patronage relation to the association seems to them to give the most equitable basis of control. It provides also for proxy voting, and thus represents a distinct departure from the principle of personal and equal suffrage so vigorously urged by followers of the Rochdale school.

It should be noted also that this law does not provide a method of financing in lieu of the sale of capital stock, nor does it stipulate how revenues shall be disbursed or expenses defrayed. It merely indicates that by-laws may be drawn to provide for "the amount of membership fee, if any, and the amount which each member shall be required to pay annually, or from time to time, if at all, to carry on the business of the association, and also the compensation, if any, to be paid by each member for any services rendered by the association to him, and the time of payment and the manner of collecting the same, and for forfeiture of the interest of the member in the association for non-payment of the same." Consolidation and federation of associations are permitted, though the word "federation" does not appear nor is the process described. Like the law of 1895, this law says nothing about contractual relations between the association and its members.

The statute is distinctly permissive rather than prescriptive in its form, allowing the utmost latitude to co-operative associations. Under its terms, however, California has built up a great volume of successful and apparently permanent co-operation,[14]

[14] "It seems to me to be a point of interest in connection with non-stock organizations in California that some of the larger developments did not see the advantage of the non-stock form until the Clayton Act was passed. Though California's non-stock law was passed in 1909, it was not until 1916 that the California Fruit Growers' Exchange reorganized from its capital stock basis to a non-stock plan. Likewise the raisin growers in their or-

and has perfected methods of organization and practices which have been copied or adapted widely in other parts of the country.[15] More recent developments in California laws pertaining to co-operatives will be discussed in the following chapter.

III. THE ALABAMA LAW OF 1909

While the California law is the one ordinarily referred to as the source from which the non-stock type of association has sprung in this country, there were two other apparently quite independent and

ganization in 1912 formed with capital stock instead of following the 1909 act. Among more recent organizations, the poultry producers' associations in California are representative of organizations adopting the capital stock plan." O. B. Jesness, University of Kentucky.

[15] The law was copied by Florida in 1909 and by Colorado and New Mexico in 1915. Oregon in 1909 passed a statute modeled very closely upon the Nevada statute of 1901, which in turn followed in its main features the California law of 1895. One section of these laws, however, which was not found in the California Act, is distinctly interesting in connection with the present discussion.

"This act being passed to promote association for mutual welfare, the words 'lawful business' shall extend to every kind of lawful effort for business, educational, industrial, benevolent, social or political purposes, whether conducted for profit or not, and this act shall not be strictly construed, but its provisions must at all times be liberally construed, with a view to effect its object and to promote its purposes."

Quite evidently the word "profit" as used in this clause means financial advantage and not profit on capital in the sense technically employed today to describe "non-profit" associations.

The Oregon law of 1909 was repealed in 1915 to be superseded by a law of the Wisconsin type, subsequently amended to include many provisions characteristic of the California law of 1909 and the Kentucky law of 1922. In 1921 Nevada adopted a statute substantially following the California law of 1909.

The Idaho law of 1919 appears to reflect the influence of the California law of 1895.

spontaneous expressions of the fraternal idea in co-operative legislation. The first of these occurred in Alabama as a result of a single-tax colonization enterprise.[16] About 1893 a group of followers of the doctrines of Henry George came to Alabama and settled in Baldwin County. They undertook there to establish an agricultural colony to be conducted in such a way as to promote the common well-being of its members. Finding some difficulty in carrying out this purpose under the existing laws of the state, they secured in 1903 the passage of a special statute such as they thought would meet their purposes. This statute was entitled, "An Act to provide for the organization and regulation of corporations not for pecuniary profit in the sense of paying interest or dividends on stock, but for the benefit of its members through their mutual co-operation and association," or, as stated in the body of the act, "for mutual benefit through the application of co-operation, single tax, or other economic principles." This law was very brief and general in its terms and permitted any association formed under it to "adopt such constitution and by-laws as it may see fit, not to conflict with the constitution of this state."

The significant fact in this connection is that the

[16] The writer is indebted to Mr. Alto Lee Whitehurst of the University of Alabama for several important details of the subject under discussion. In response to a request for some information as to the development of the co-operative law of Alabama he made a careful examination of the matter, which was embodied in a thesis submitted for the degree of master of arts.

pattern thus laid down by a semi-communistic group shortly appealed to their neighbors who were engaged in the production of fruits as a means by which they might introduce a helpful principle of service rather than profit into the conduct of their own business. Hence, in 1909 they secured the passage of a new law which was in effect the statute of 1903 slightly revamped in its title and purpose clause. The law of 1909 was entitled, "An Act for the incorporation of mutual co-operative societies or associations for farming and trucking purposes, and for the exemption of the same from all corporate taxation and licenses," and Section 1 read as follows:

> Section 1. Whenever ten or more farmers, truck growers, orchardists, or other producers of the fruits of the soil, wish to form an association or corporation, not for pecuniary profit in the sense of paying interest or dividends on stock, but for mutual benefit through the application of co-operation, or other economic principles, they may become a body-corporate [etc.].

That this statute had some significance in the development of co-operative law in the United States is evidenced by the fact that an association formed under it (Baldwin County Producers' Corporation) was concerned in a decision (see page 280) which has been frequently cited in co-operative litigation. The decision in this case upholds the validity of a by-law requiring members to pay to the association 3 per cent of the gross selling

price of their product sold outside the association, which indicates that the idea of members' contractual obligation to their association has been definitely developed under this law.

IV. THE TEXAS LAW OF 1917

A third spontaneous origin of the non-stock co-operative association embodying the fraternal idea of membership may be traced to Texas through a law passed in 1917.[17] This act was drafted by Mr. Walton Peteet, one-time Secretary of the National Council of Farmers' Co-operative Marketing Associations. In connection with agricultural extension work in Texas he had become deeply impressed with the universal tendency for farmers to lose control of associations which they organized and incorporated under the existing general corporation laws of the state. Stock drifted into the hands of outsiders, and the companies soon were directing their operations toward the payment of large dividends to stockholders rather than toward giving good service and maximum prices to the farmer. Mr. Peteet, therefore, set about drafting a bill which would keep the association completely and permanently in the hands of the farmer group who were interested in establishing it. He confesses that at that time he "had never read a co-operative statute," although he was familiar with the Rochdale idea of patronage dividends. This was shown in Section 5, which read:

[17] *Laws of Texas,* 1917, Chapter 193.

Section 5. Corporations chartered hereunder shall be purely co-operative, and not for profit, and shall not be required to pay any annual franchise tax. . . . Such Societies may, by their Directors in accordance with their by-laws, pass their profits to the surplus fund or divide the same among the members of the Society in proportion to the respective contributions in cash to the working capital of the corporation and patronage of their members.

The drafter of the bill states that this very mild, permissive provision was as strong a clause as he thought could secure legislative acceptance at the time.

The ideas of non-transferable membership and limitation of membership to persons directly engaged in the industry to be benefited were set forth in the following sections:

Section 1. That private corporations may hereafter be incorporated for the purpose of enabling those engaged in agricultural pursuits to co-operate with each other for the purposes named in this Act. Only those engaged in agricultural pursuits can become incorporators of or members of Societies chartered under this Act.

Each corporation chartered hereunder shall contain as a part of its name these words, "Farmers' Co-operative Society." No. 1. Provided persons not engaged in agricultural pursuits may be permitted to contribute an amount not in excess of one-third the outstanding working capital of the society.[18]

[18] The last sentence of this section is an amendment added to the bill during its passage. Through a clerical error it was inserted at the end of the second paragraph instead of the first, and the number by which it was designated was incorporated in the final bill. The provision should read as follows:

"Only those engaged in agricultural pursuits can become in-

Section 8. Membership in Societies incorporated under this Act can be obtained only by election thereto at the time of the organization of the Society by the organizers thereof, or by the Board of Directors of such Society when organized under such rules and limitations as may be made in the by-laws. Members shall each have one vote only in the management of the affairs of the corporation. Members may be suspended or expelled for misconduct under such rules and regulations as may be prescribed in the by-laws. In case of expulsion the Society shall return to the member at such time as may be fixed in its by-laws an amount equal to the money value of the amount contributed by such member to the working capital of the society.

Section 9. Membership certificates shall not be transferable, but members shall have the right of withdrawal under such rules and regulations as may be adopted by the Society in its by-laws. In case of withdrawal the Society may return to the member an amount equal to the money value of the amount contributed by him to the working capital of the Society.

This law contained no provision forbidding the issue of capital stock nor, on the other hand, did it authorize it. The purpose was to have "working capital" supplied by the members, and a rather general provision covering this was contained in Sections 6 and 10:

Section 6. Corporations chartered hereunder shall have property of not less than Five Hundred Dollars in value, which may be cash, property or notes acceptable to the Board of Directors; provided, however, that no membership certificates shall be issued for subscriptions

corporators of or members of Societies chartered under this Act; Provided persons not engaged in agricultural pursuits may be permitted to contribute an amount not in excess of one-third the outstanding working capital of the society."

in the form of notes until such notes have been paid in full, principal and interest, and the holders of membership certificates for which cash or property has not been paid, while entitled to vote in the management of the affairs of the corporation, shall not be entitled to share in its dividends nor in a distribution of any assets until such notes are paid in full . . .

Section 10. Unless otherwise provided, the members of a corporation chartered hereunder shall not be responsible to the corporation, or to its creditors, in excess of the membership shares subscribed by them, and when such shares are paid for their liability shall cease, provided, however, that the association may, in its by-laws, make each member responsible for an additional amount equal to 100 per cent of the shares owned by a member . . .

A considerable number of associations were incorporated under this statute.[19] Many of them are still in active operation, and the law remains on the books, although to some extent superseded by the "standard marketing act" (see Chapter V) which was passed in 1921. Apparently this Texas law of 1917 was not copied in any other state.

By way of summarizing the development in these three states and such others as copied the California

[19] The act was designed to provide not merely for marketing associations, but it also (indeed as the first item of its purpose clause) conferred "authority to borrow money and discount notes to an aggregate amount not in excess of five times the working capital of the corporation" and to "loan their funds to members upon such terms and such security, if any, as may be provided in their by-laws." It provided also for fire, livestock, hail, cyclone, and storm insurance and the ownership and operation of "such machinery and instrumentalities as may be necessary in the production, harvesting, and preparation for market of farm and ranch products." Under this law a considerable number of local cotton gins have been organized and successfully operated.

statute, it may be noted that the three objectives, namely, the elimination of capital stock, the disappearance of profits, and the development of personal and responsible membership which had appeared in the growth of various associations, had nowhere been fully and explicitly carried over into statute law. They had, however, become so well established in practice that the time seemed ripe for the formulation of a rather comprehensive measure in the form of a "model law" which might be used in states where it was desired to provide positively and unambiguously for the authorization of such practices. A pattern measure was therefore drafted by the United States Department of Agriculture in 1917.

CHAPTER IV

THE ATTEMPT TO CODIFY CO-OPERATIVE DEVELOPMENT UP TO 1917

It has been suggested in Chapter I that the economic theories and commercial ambitions of business men tend toward devising and perfecting what seem to be suitable procedures before such practices have secured the definite recognition and sanction of law. Even when legislative action is invoked to give definite status to such economic forms, it is frequently regarded as the safest practice to draft the law in the most general terms possible in order that sufficient flexibility may still be allowed persons working under the law to continue the process of experimentation and adaptation of their commercial undertakings to the varied and changing circumstances under which they must of necessity be carried on.

At the same time there is a pull felt in the opposite direction. In so far as distinctly new forms or methods are employed, or as questions in the twilight zone of public policy are raised, it may be felt highly important to secure a positive expression of public sentiment through the people's legislative

representatives. Often it is found that courts are inclined to take a reactionary attitude and to feel bound by some rule derived from ancient precedents at a time when the evolving economic situation seems to some members of the business world to call for the enunciation of a new rule more in harmony with these changed conditions. For the legislature to express itself plainly upon such issues in enabling acts or special statutes is to give the courts, in case of litigation, a clear statement of legislative intent.[1]

The need of bringing statutes up to current patterns of thought and practice is very well illustrated in the development of our co-operative law. The earlier statutes, as we have seen, were very general in character and disposed merely to authorize two or three features of form or practice more or less at variance with those of the ordinary business corporation. It was either explicitly stated in such laws or ruled by the courts that all other matters should be adjudicated in accordance with general corporation law or with general statutes designed to cover questions of competition, monopoly, or restraint of trade. Such attempts to put new wine in old bottles were by no means satisfactory, and co-operators were therefore coming to feel urgent need of a statute which would differentiate the co-operative association clearly from the ordinary in-

[1] For the value and limitations of such declarations where they have been inserted in co-operative statutes see pp. 285, 313, and 364.

corporated company and would make an affirmative statement of public policy with reference to its position in the commercial world.

It was the framing of the Clayton Act amending the Sherman anti-trust law which brought this somewhat amorphous yearning to the stage of action. This was in 1914. Senator La Follette was the spokesman of a group who believed that organizations of laborers and of farmers should be clearly exempted from the operation of laws designed primarily to prevent the abuse of power by big industrial or mercantile corporations.[2] The phrasing of a suitable clause to cover such trade union organizations was not difficult, but when it came to agricultural associations it appeared that there was a good deal of doubt as to how an agricultural co-operative organization was to be defined as a basis for any such exemption. Senator La Follette naturally turned to the Department of Agriculture in this contingency, and his inquiry was referred in due course to the Chief of the Office of Markets and Rural Organization, which had been established in the Department only a few months before. As a result of such suggestions as were offered from this source, modified as they inevitably were in the process of Congressional debate, the phrasing of this clause of the Act was as follows:

Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor,

[2] This legislation will be discussed in Chapter XI.

agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

We shall have occasion later to refer to the significance of this enactment as touching the issue of restraint of trade by co-operative organizations. The important fact at this stage of our discussion is that such exemption as was conferred was to be enjoyed only by "organizations instituted for the purposes of mutual help and not having capital stock or conducted for profit." It is obvious that the employment of this definition was calculated to turn attention away from legislation of the Wisconsin-Nebraska type, which was then being widely propagated, and toward legislation of the California type, which was being copied in other states to a lesser extent.

The passage of the Clayton Act stimulated further action in the Office of Markets and Rural Organization. The first Chief of that office was Mr. Charles J. Brand, a man who had long been familiar with the forms of co-operation which were prevalent in the Middle West, and particularly with the creameries and farmers' elevators in Minnesota. Among the first group of experts who were employed in this office also were a number of men who had

for some time been identified with marketing activities of horticultural associations in all parts of the country. There was thus in the staff of the Office of Markets a group of men well posted as to the actual practices of co-operatives in the various commodity lines and in the different sections of the country. As early as 1912, while still in the Office of Co-operative Cotton Handling and Marketing of the Bureau of Plant Industry, Mr. Brand had caused an examination to be made of the legal situation in the Southern states as it touched co-operative organization for cotton marketing. The incident of the Clayton Act stimulated this interest in the legal phases of co-operative organization, and Mr. Brand's report as Chief of the Office of Markets in October, 1915, included the following significant paragraph:

> The laws of the various States relating to the formation and management of farmers' co-operative associations are being collected in collaboration with the Office of the Solicitor, and a digest of them is being prepared. A study of these laws shows that there is a great diversity among the laws of the various States under which farmers' marketing organizations can be chartered. In fact, a majority of States make it necessary to organize under the regular corporation law, which makes no provision for the distribution of profits on the basis of the amount of sales and purchases made by the farmer with the organization. Drafts of proposed new laws to encourage co-operation in Oregon, Montana, Colorado, Wyoming, and Oklahoma have been prepared by State authorities and forwarded to this office for suggestions regarding improvement.

The Office of Markets, however, was not content to let the matter rest with a mere examination of the existing state of co-operative legislation and advice to such states as might already have bills under consideration. The Chief of this Office felt it helpful to prepare a draft bill embodying all the features of organization and operation which, on the basis of this study of existing laws by the Solicitor of the Department of Agriculture and the experience of men in the Office of Markets, with the practices thus far evolved by co-operative associations, seemed desirable. As a result of this collaboration between the technical and legal workers of the Department of Agriculture a measure was drawn up and distributed widely under the title, "Suggestions for a State Co-operative Law Designed to Conform to Section 6 of the Clayton Act." [3] We

[3] *Service and Regulatory Announcements,* No. 20, Office of Markets and Rural Organization, U. S. Department of Agriculture, February 7, 1917. For full text see Appendix C.

Professor O. B. Jesness, now Head of the Department of Markets, University of Kentucky, but a member of the staff of the U. S. Office of Markets at the time of the drafting of the Department bill, comments: "This bill was not so much an attempt at codification of existing law as it was to provide for organizations designed to fit in with the specifications of Section 6 of the Clayton Act." Possibly I have stretched the term "codification" unduly, but it was my thought that the Department bill in effect brought the Clayton Act, the more advanced types of co-operative legislation, and numerous co-operative practices which hitherto had not been specifically covered in statutes all within the view of a single co-operative law. It is true that the Department bill as drafted did not include the Rochdale type of co-operative or any stock organizations, and hence did not codify the whole of co-operative development. Elsewhere, however, Mr. Jesness says: "It is my recollection that the Office of Markets had in mind recommending two laws, one for non-stock organizations and the

shall refer to it hereafter for the sake of brevity as the "Department bill."

Many provisions of the California law of 1909 were incorporated in the draft bill which, however, included also several features characteristic of practices of California associations, but not yet specifically covered in the California law.[4] The statute of 1909 had provided for non-stock, non-profit associations whose incorporators must be "persons engaged in the production, preserving, drying, packing, shipping, or marketing of agricultural, viticultural, or horticultural products" and such other persons as might be admitted "upon such terms and conditions as to membership and subject to such rules and regulations as to their, and to each of their, contracts and other rights and liabilities between it and the member, as the said association shall provide in its by-laws." Such membership was to be evidenced by a membership certificate which was non-transferable. This and certain other clauses as to the expulsion of members indicate clearly the personal basis of membership which was contemplated. On

other for capital stock organizations, but because of the large number of states already having capital stock laws and because of the desire to concentrate on the type of organization contemplated by Section 6, only one bill was put in final form." This seems to confirm the view that they had in mind the drafting of a complete co-operative code, and the two bills contemplated would in fact have represented a codification of all co-operative development up to that time.

[4] Mr. G. Harold Powell, General Manager, and Mr. George E. Farrand, General Counsel, of the California Fruit Growers' Exchange, and other co-operative leaders were freely consulted during the drafting of this measure.

the other hand, the rule of one-man-one-vote was not prescribed in this law, and proxy voting was specifically permitted.

Turning now to the Department bill for comparison, we find that it likewise provided for non-stock, non-profit associations and emphasized the personal character of membership therein. It went considerably further than the California statute, however, in limiting membership to "persons engaged in agriculture or horticulture," such membership to be forfeited upon proof being made to the association that the member had ceased to be so engaged.[5] These sections of the law, it will be observed, correspond respectively to the three terms which had been employed in the Clayton Act, namely, "mutual help," "not having capital stock," and "not conducted for profit." They represent three outstanding characteristics by which the co-operative association differs from the ordinary commercial company. In the first place, it contemplates a group of persons engaged in a common economic enterprise who associate themselves together to maintain a joint agency which shall render service to all these business associates on a mutual or cost basis. The importance, therefore, of limiting transactions to their own members is clear; otherwise we have no safeguard to prevent the organization from

[5] As to voting, the bill provided that "each member shall be entitled to one vote only and no vote by proxy shall be permitted."

becoming a profit-sharing rather than a non-profit company.[6]

Second, the phrase "not conducted for profit" is one that has been much misunderstood, and was indeed a stumbling block to many in the debates held in Congress relative to the Clayton Act.[7] It does not mean that the members of a co-operative association do not expect to receive economic benefit from its operations. On the other hand, it does mean that these benefits, even though measurable in pecuniary terms, shall accrue to participating members to enhance the return from their own operations as producers, rather than going as profits to those persons who have furnished capital to the joint enterprise. It implies also, as suggested above, that such earnings shall not be derived from the business of non-members, since a mutual help organization cannot properly run the risk of losing or speculate upon the chance of gaining from the business of outsiders.

In the third place, the more extreme group of co-operative associations, in turning away from the capitalistic and profit-seeking basis of organiza-

[6] The only way of avoiding this situation is to have the business of non-members handled with the utmost care to see that payments to them represent exactly the proceeds received for their product less actual cost of handling. This result can only be approximated under most co-operative methods of disposal. Furthermore, giving non-members the full benefits enjoyed by members without requiring them to support the enterprise with funds or business as members are required to do is likely to prove a source of dissatisfaction to the latter.

[7] *Congressional Record*, 63rd Congress, 2nd Session, pp. 9548, 9566, 9569, 9571, 9577, 9578.

tion, thought it correct in logic and found it expedient in practice to abandon the capital stock form. Persons thoroughly imbued with the capital stock idea of organization often leap to the conclusion that a non-stock form implies the absence of capital. Realizing that most co-operatives need considerable amounts of capital, they assume that the non-stock form is suitable only for mere bargaining associations or those which ship a product on consignment. As a matter of fact, non-stock associations in California and elsewhere have not been limited to those which operate with little or no capital, but have demonstrated that capital can, by this device, be effectively provided for. On the theory that the contribution of capital should be regarded as an obligation on each member in proportion to the use which he makes of the facilities of the association, they have treated capital contributions as loan funds to be paid for at the market rate or, in some instances, even below that rate.[8]

The drafters of the Department bill evidently thought it possible to go somewhat further than the

[8] It has already been pointed out in Chapter II that the member who holds a loan certificate is in some ways in a stronger position than he would be with a stock certificate. Space does not permit of going exhaustively into questions of co-operative finance, but it should be borne in mind that one f the outstanding tenets of co-operative theory is that whatever capital cannot be conveniently and economically supplied by outside financing should be furnished by members in proportion to the use they make of the association. This can be done with the utmost nicety under a revolving fund system by which assessments for the capital account are charged against every unit of product handled as part of the regular service charge. The

California statute in providing fixed and working capital, while at the same time not prescribing rigid financial plans in the enabling act. They therefore set forth these obligations of the member to contribute to the financial support of the co-operative organization in the following terms:

Sec. 17. An association may provide for the payment of expenses, necessary in the performance of its services to its members, by the creation of a working fund or otherwise, through fees, dues, assessments, or charges for the services, to be fixed and collected in such manner as may be prescribed in the by-laws. Such fees, dues, assessments, or charges shall be limited to the amounts necessary to meet expenses already incurred, or reasonably estimated as essential to be incurred, by the association in conducting its operations. Whenever any association shall find that it has accumulated funds in excess of those necessary to meet expenses already incurred, or reasonably estimated as essential to be incurred, by it in conducting its operations, it shall return such excess to, or deduct it from, future fees, dues, assessments, or charges of the members who contributed to such excess in the proportions of their respective contribution.[9]

principal objection to such an arrangement is that it presupposes a rather permanent connection between the member and his association, whereas the restless independence of the American farmer craves the utmost mobility in his business connections. This is probably the most serious obstacle to the success of co-operative enterprise in this country in its financing as well as its operative aspects.

[9] This provides, of course, only for such financing of the association as it may be necessary or expedient to effect from within their own ranks. In addition thereto the law provides, with reference to borrowed capital, that associations shall have power "to borrow money necessary in the conduct of its operations, to issue notes and bonds therefor, and to give security, in the form of mortgage or otherwise, for the repayment thereof." (Sec. 6f.)

It will be remembered that associations of the Rochdale type had acted in a dealer capacity, buying outright from their members and reselling for the account of their company. Many of the horticultural associations and others, both in California and elsewhere, had acted on an agency basis for their members, although the California law was silent as to the character of this relationship. The Department bill, however, stated it explicitly in the following terms:

> Sec. 3. An association may, as agent for its members or any of them, perform for them services connected with the production, preservation, drying, canning, storing, handling, utilization, marketing, or sale of agricultural and horticultural products produced by them, and for the agricultural or horticultural purposes of such members, may perform for them services connected with the purchase or hiring for, or use by, them, of supplies, including livestock, machinery and equipment, and the hiring of labor, or any one or more of the kinds of service specified in this section.

Several points need to be considered in explaining this limitation of co-operative associations to the agency type of dealing. The drafters of the bill naturally were familiar with co-operative enterprises whose operations were limited primarily to the shipment of goods on consignment to private selling agencies in the terminal markets or, at most, to the sale of perishable products through their own brokerage organization. An agency relationship is satisfactory for this type of dealing since no long-

time marketing programs, involving storage of the product and financing it during a lengthy merchandising period, are called for. On the other hand, the Department bill included a provision for dealing with non-members,[10] and the admission of non-member business might have been thought to call for the agency relationship in order that the non-profit character of the business should be safeguarded. Even before this bill was drafted, however, beginnings had been made toward providing a long-time merchandising type of association handling staple commodities. Such operations are greatly facilitated by the passing of title to the association and hence have led to statutory provisions of a very different sort. Subsequent developments along this line will be discussed in a later chapter of the book. (See page 187.)

Finally, we have in Section 13 of the Department bill a provision designed to tie the member and his patronage definitely to his association by the device of an exclusive marketing agreement. We must reserve to a later chapter the discussion of the evolution of this phase of co-operative procedure. It is sufficient here to observe that the adaptation

[10] "Sec. 11. The association, as agent for a non-member, may buy farm supplies for him and sell his agricultural or horticultural products and, as a condition of its contract with such non-member, may impose upon him any liability for the contracts, debts and engagements of the association which does not exceed the liability of a member; but in no case shall it charge a non-member for such services more than the actual cost thereof, including the pro rata part of all overhead expense."

of ordinary contract forms to the peculiar needs of co-operative associations had been going on for many years. Such contracts had become well established in the practices of the California associations, and the general laws of that state (Civil Code, Sections 1670-1671) specifically authorized agreements stipulating that parties to a contract might liquidate their damages when from the nature of the case it would be impracticable or extremely difficult to fix the amount of actual damage. These contractual arrangements were not in fact brought within the field of Congressional debate on the Clayton Act, but the Solicitor and his advisers in the Department of Agriculture evidently thought that the type of association contemplated in that measure was reasonably to be defined as one made up of individual producers tied together contractually for the maintenance of a joint agency on a cost-of-service basis. The Office of Markets had indeed employed such a contract form in its work with co-operative organizations.

For some reason, however, they covered the exclusive dealing feature in a clause providing for by-laws requiring exclusive patronage of the association by the member rather than authorizing the drawing of contracts to this effect. Of course the use of a by-law of this sort would not preclude a separate contract also, and indeed might suggest and facilitate its use. The patronage control clause of the Department bill read as follows:

Sec. 13. The by-laws may require the members to sell all or any part of their specifically enumerated agricultural and horticultural products, and to buy all or any part of their specifically enumerated farm supplies, exclusively through the association; but, in such cases, shall specify a reasonable period, in each year, during which any member, by giving to the association the notice prescribed in the by-laws, may withdraw and be released from his obligation to employ the services of the association in respect to such products and supplies. The by-laws may fix as liquidated damages, specific, reasonable sums, in amounts fairly related to the actual damages ordinarily suffered in like circumstances, to be paid to the association, to reimburse it for any damage which it or the members may sustain by the failure of any member to perform any obligation to the association under the articles of association, and any such provision shall be valid and enforceable in the courts of this state.

In view of the vogue which has recently been attained by long-time binding membership contracts, the requirement of this section that opportunity must be available for the member to withdraw by giving written notice at a certain time in any year is striking. It reflects the practice of California associations prior to that time, and the drafters of the bill evidently felt that it was either equitable or expedient for the member to be permitted to withdraw from such obligations after a relatively short time if he so desired. The only logical inference is that this would imply also withdrawal from membership in the association. This bill also recognized the assessing of liquidated damages as a means of enforcing the by-law provision

for exclusive patronage directly in the co-operative enabling act. We shall have occasion in later chapters of the book to examine further the development of co-operative thought, as well as legislation, on these points.[11]

It is apparent that this bill made considerable advance beyond previous legislation in the way of incorporating definitely into the statute several provisions which heretofore had had only such standing as they might acquire through use by individual associations and such recognition as they might receive from courts in specific cases. That the publication of the draft bill had some influence in shaping the development of co-operative statutes in this country is evidenced by the fact that New York and Louisiana passed bills substantially identical with this measure in 1918, Pennsylvania in 1919, New Jersey and Ohio in 1920, and that many of its provisions are to be found in the Iowa law of 1921. There is considerable similarity also between its terms and those of the law that has recently attained wide vogue and is commonly referred to as the "standard marketing act," which will be discussed in detail in the following chapter.

Inasmuch as the Department bill represented substantially the point to which California thought and practice had advanced at that time, the co-operative creed of its most prominent leader might well be set

[11] See pp. 108 and 183ff.

forth in this connection. In the words of Mr. G. Harold Powell:[12]

A co-operative association is one in which the members form an agency through which they conduct their own business for their greatest mutual advantage. To be co-operative, it must be formed of producers, exclusively, and managed by them, and the benefits must be returned to them in proportion to the patronage of each. The capital necessary to create the agency and its facilities should be contributed by the members in proportion to the use which each makes of it. Also, the capital contributions of each member should be kept progressively proportional to the individual shipments, or purchases, or other uses made of the agency, as nearly as this may be done.

. . . There is an essential difference between a co-operative organization and a capital-stock corporation operated for profit. A capital-stock corporation for profit is founded on the earning capacity of the capital invested and that investment is the basis of administration, and of control, and of the distribution of earnings. The co-operative organization, on the other hand, is founded for the mutual benefit of the members, while the earnings, or profits, are returned, not on the basis of the capital which each member has contributed, but rather on the volume of his shipments, or his purchases, or are proportional to any other use which he makes of the association. The foundation of the co-operative association is *men* and, preferably, each member has an equal voice in directing its operations; but in the capital-stock corporation for profit, the foundation is *capital* and the voice of the stockholder in its direction is proportional to the capital contributed by him. Therefore, a co-operative association, as contrasted with a profit-making organization, may be tested by the motive under-

[12] "Fundamental Principles of Co-operation in Agriculture," Agricultural Experiment Station, University of California, *Circular No. 222,* October, 1920.

lying its operations. In the former, it is operated for the mutual help of the members; in the latter, it is for the profit or advantage of the corporation itself.

. . . There is much confusion in the use of the term "co-operation" as applied to agricultural affairs. This term, because of its popularity in the public mind, is commonly applied to any group of farmers who are associated for business purposes. It is used to describe voluntary, unincorporated associations; or incorporated capital-stock associations for profit; or stock corporations with reasonable limitation on stock ownership, and also on the voting power accorded to members, and on the distribution of earnings; and again to organizations instituted for the purposes of mutual help, without capital stock and not conducted for profit. . . . The term, because of the popular misconception referred to, is capitalized for business purposes.[13]

One of the reasons for this confusion lies in the fact that the various states have not enacted uniform laws that provide for the formation of co-operative associations of farmers. . . . Only about thirty-five states have, to date, enacted special laws that provide for the forma-

[13] In order to meet this situation the Department bill contained a section limiting the use of the word "co-operative" as follows:

"Hereafter, unless expressly authorized by law, no individual or partnership, nor any corporation or association formed in this State otherwise than as provided in this act, shall adopt and use the word 'cooperative,' or any abbreviation or derivative thereof, as a part of the name or designation under which such individual, partnership, corporation, or association shall do business in this State. Any association shall be entitled to sue for, and to obtain in any court of competent jurisdiction in this State, injunctive relief against the use of the word 'cooperative' by any individual, firm, corporation, or association who shall violate the provisions of this section.

"Every person now doing, or hereafter commencing to do, business in this State under the name or designation which includes the word 'cooperative,' or any abbreviation or derivative thereof, shall within [ninety] days after the passage of this act, or before so commencing to do business, file with the [proper state officer], in such form as he may require, a statement showing such name. Hereafter no person shall commence to

tion of producers' co-operative societies, and possibly ten states have legislation that permits the formation of associations without capital stock.

. . . There is a growing recognition of the economic need of organization by producers. The farmer can no longer deal with his business problems as an individual because he now has to cope with organized industries in the production, distribution, and sale of his crops. If he is to meet these problems successfully in the future, he must join with his neighbors in forming an organization through which they can solve their common problems co-operatively, and he must have laws provided that will enable him to do this. . . .

The practical difficulty in incorporating a co-operative association under the profit-corporation laws lies in the fact that it is questionable whether all the above mentioned conditions agreed to by the stockholders are legally enforceable and whether the organization might not possibly cease to be co-operative whenever stockholders representing a majority of the stock desire to exercise their legal privileges. . . .

The Department bill went far toward meeting the legislative deficiencies to which Mr. Powell here calls attention. It was probably adequate for the purposes of horticultural associations and would provide for marketing activities of the character represented by the great majority of co-operative enterprises which had been operating prior to that

do business in this State under a name or designation which includes the word 'cooperative,' or any abbreviation or derivative thereof, if such name or designation be the same as that of any existing association, or so similar to such name as to be likely to be confused therewith. Any person violating or failing to comply with the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than [five hundred] dollars."

time. However, a new leaven was already at work within the co-operative movement which was destined to introduce a new leadership in co-operative legislation and to supersede the Department bill of 1917.

CHAPTER V

"COMMODITY MARKETING" AND THE DRIVE FOR A UNIFORM ACT

We have passed in review three stages in the development of agricultural co-operation in the United States: (1) the period of informal and experimental beginnings in which either the unincorporated association or incorporation under the ordinary commercial forms was used; (2) the attempt to standardize practice in accordance with the Rochdale principles, leading to laws of the capital-stock, patronage-dividend type; and (3) nonprofit practices and non-stock laws of the California type and their codification in the Department bill of 1917. The points discussed under these three heads have brought us to the consideration of events some of which occurred as recently as 1921. We must now go back to a period five years earlier to observe the beginnings of a fourth influence, which has become the most conspicuous and possibly the most significant in our present-day co-operative movement. This is what is commonly referred to as "commodity marketing."

I. THE CALIFORNIA STATE MARKETING COMMISSION

So far as public manifestations were concerned, the "commodity marketing" movement began with the appointment of Colonel Harris Weinstock as Director of the California State Commission Market (later reconstituted as the State Market Commission). Colonel Weinstock's general purpose was to achieve through his office a closer co-ordination of co-operative effort among agricultural and horticultural producers of the state. With the pattern already before him of strong federated organizations like the California Fruit Growers' Exchange and large centralized agencies like the California Raisin Growers' Association, he aspired to work out a program under which each of the important lines of production in the state would be integrated into a single marketing organization.

To understand properly the line which Colonel Weinstock's activities took in this connection we must consider also his associates and previous business career. He had been for many years a business partner of David Lubin, who was his half-brother. Lubin is justly famous as the founder of the International Institute of Agriculture at Rome, but his rather ambitious visions of the large-scale organization of agriculture expressed themselves also in other schemes than that of the Institute. During his travels in Germany he had been much impressed with the *Landwirtschaftsrat,* and subsequently for-

mulated an elaborate national marketing system which he urged for adoption in this country.[2] This plan called for a national marketing commission with state and local organizations for disseminating information and stabilizing the movement of produce—in his own phrase, "a semi-official information bureau for the purpose of scientific marketing of agricultural products."

Weinstock himself was a member of the American Commission which visited Europe in 1913 to study co-operation and rural credit, and he and his half-brother argued long and earnestly over methods of improving agricultural marketing in the United States. Frequently a third participant in these arguments was a young attorney who had recently become a family connection through marriage, Aaron Sapiro. He had been fascinated by the intricacies of corporation law, and the possibility of applying and adapting somewhat similar corporate machinery to the needs of agriculture struck him as offering a distinctive and helpful field of work. These men looked upon California as a great and varied producing plant with a large and diversified commercial surplus which called for skilful merchandising in the markets of this country and abroad. Each commodity line represented to them a department of the whole state's business, and they believed that the interest of these commodity groups could

[2] *A Practical National Marketing Organization and Rural Credit System for the United States,* A Hearing Before the U. S. State Department, June 21, 1915.

be dealt with effectively only if each were brought together under some co-ordinated leadership which should provide for adequate standardization and inspection of the product, the dissemination of information, the provision of adequate credit, and skilful distribution of the product in all available markets. The State Market Commission was conceived as the official promoter and guide of such organization along co-operative lines. The general point of view is fairly well set forth in an address made by Director Weinstock in January, 1916, to the prune and apricot growers assembled at San José.

If I can show you the way to get every cent that your prunes are worth today, tomorrow, next week, next month, and next year; if I can show you the way to develop not only the American but the foreign market to the limit; if I can show you the way to prevent the glutting of your markets; if I can show you the way whereby you can hold your surplus until the world's market is ready to take it at a living price; if I can show you the way whereby, despite the fact of your being a small, obscure, unknown grower, living in a nook or corner of the state, you can borrow up to 75 or 80 per cent of the market value of that product at the same rate of interest that a Rockefeller or a Pierpont Morgan can borrow his million, will you follow me? Will you hold up my hands? Will you be guided and directed by me?

Let me tell you what must be done. First of all you must organize. This industry, scattered through the state as it is, would make one large democratic organization impracticable. You must follow the example of the orange growers and have local organizations. They must federate into central organizations and these must federate into one prime, central body which will have

control and power exactly as in the orange industry; then you must be prepared to subscribe at least $250,000. Individually, that looks large, but when spread among your thousands of growers and over the vast acreage of the prune industry, it is a mere nothing. You must have that financial nucleus to entitle you to the credit you want to look for. After you have organized and have subscribed that fund of $250,000 you must be prepared to standardize your product and to permit the state to have it inspected.

Having done that, the next step is to warehouse your product so that you will not be forced to sell a year's crop within a few weeks, thus glutting the market and killing prices. After warehousing your output, I will agree to take your warehouse receipt, verify it in the name of the State, and on that warehouse receipt I will undertake to go into the money market of New York and borrow perhaps 75 to 80 per cent of its face value at the lowest interest. This year it may be 3½ per cent; next year it may be four, or it may be five; whatever it is, you shall have it.

Subsequently, Director Weinstock submitted a series of recommendations to the Organization Committee. Three excerpts from these recommendations are extremely interesting. They are given below:

(3) Said promotion committee shall have as its objective the organizing of a state association with a paid-up capital stock of not less than $250,000 and not more than $1,000,000. The members of such an association shall agree to enter into a contract with the association for the association to market their crops for at least three years, with an option on the part of the association for two additional years' crop.

(6) Failure to deliver on the part of the grower shall

be covered by a definitely fixed penalty, say, two cents per pound, as liquidated damages to the association.

(7) The agreement shall not go into effect unless, within a specified time hereafter to be determined, a certain percentage hereafter to be determined, of the total acreage of the prunes in the state is contracted for under similar terms.[3]

[3] Mr. Sapiro drafted these recommendations, basing them chiefly upon the previous experience of the raisin association and the contractual needs of such a marketing enterprise. He comments: "I established in Weinstock's mind, as well as generally, that the one distinction between successful co-operation in California itself and futile attempts there and between California successes and Eastern enterprises was organization by commodity as contrasted with organization by locality. In 1913 I first convinced Weinstock of that, and established thereby the parallels of industrial commodity organization. This is my one contribution of the early days—*articulating* the experience in successful co-operation."

To the writer it seems that the phrase "organization by commodity" as distinguished from "organization by locality" is likely to prove ambiguous and tends to veil the real point at issue. The exigencies of commercial practice had caused co-operative enterprises in the East and Middle West to be quite as restricted in the number of commodities handled as were those of the California group. The really new thought which was here introduced was that organization should be, if not co-extensive with the bounds of the industry, at least so intensively developed as to put the single co-operative organization in a dominant or, at the very least count, a significant position within the industry as a whole. The major proposition runs in terms of commodity control, and the logical corollary of this proposition is a form of organization based on a tie-up between the member and the association which shall be both strong and relatively permanent. However, it does not follow that a belief in the efficacy and propriety of the binding contract as a feature in the structure of the co-operative association, or a belief in the commercial expediency of limiting the business to a single commodity or a very small number of closely related commodities, must be followed by insistence upon control of a certain percentage of the commodity as a prerequisite to the beginning of operations under all circumstances. It may be suggested that the character of the commercial organization existing on the buying side of the market will very largely determine the significance of this particular point, which might be very great in

It is not our purpose here to recite the history of co-operative organization in California during the period that Colonel Weinstock was Director of the Market Commission. It is, however, worth while to notice that from the beginning he considered the binding contract, organization co-extensive with the producer group, an efficient information service, highly standardized product, and group access to outside sources of credit the essentials in an efficient system of distribution. Grower contracts had been in use for some time in California, and the one then employed by the raisin growers was taken as the basis for subsequent work by the marketing commission. Mr. Sapiro, who had served from the beginning as legal counsel for the Commission, undertook the task of adapting the raisin growers' contract to the needs of various associations dealing with non-perishables and to secure its fuller recognition by the courts.

some cases and relatively slight in others. If so, it could hardly be taken as the single test or even important test of what is meant by "commodity marketing." It seems, however, to have been given such a position of importance by many advocates of the movement during the last few years.

Compare Steen, H., *Co-operative Marketing*, p. 6. "The first clear-cut recognition of the principle [of "commodity marketing"] did not take place until 1912, when the raisin growers of the San Joaquin Valley made the formation of the California Associated Raisin Company contingent upon the affiliation of at least 60 per cent of all growers of that crop. The sensational success of the raisin association led to general recognition of the commodity principle in California, and within six years more than twenty organizations were formed there upon that basis. Thus a century elapsed between the first attempt at co-operative marketing in America and the perfection of the commodity plan."

II. THE DRAFTING OF THE "STANDARD MARKETING ACT"

In the prosecution of this work Mr. Sapiro became convinced that it was necessary to secure statutory provisions recognizing such contracts and authorizing vigorous measures for their enforcement. He therefore set about drafting such a measure as would, in his judgment, meet the needs of this situation. No action was taken at the time to have it adopted in the state of California, but when in 1919 its framer undertook the organization of the Oregon Growers' Co-operative Association he was again impressed with the inadequacy of existing statutes to meet the needs of modern co-operative organization. This resulted in substantial amendment to the Oregon law during the 1921 session of the legislature.

Meanwhile, however, the organization of cotton associations in several of the Southern states had been undertaken and, as an aid to such organization along lines considered necessary by Mr. Sapiro, a comprehensive measure drafted by him on the basis of his California and Oregon experience was presented first to the legislature of Texas and shortly thereafter to the legislatures of several of the other Southern states. This measure was passed substantially in its original form by the states of Arkansas and Idaho in February, 1921; by Texas, Arizona, Kansas, Montana, North Carolina, North

Dakota, and Washington in March, 1921; and by Georgia in August and Alabama in October of the same year. The year 1922 saw relatively few legislatures in session, but on January 10 of that year the so-called Bingham Act was passed by the legislature of Kentucky. As this embodied several amendments which had grown out of earlier experience with the law, the Kentucky Act is ordinarily taken as the typical form of the Sapiro law,[4] and will be used as the basis of our subsequent discussion. By the addition in 1923 [5] of some fourteen states to the list of those adopting this law, and by smaller additions in 1924 and 1925 (this including states that amended existing laws in substantial conformity with the new act), it may now be said that all but eight states of the Union have within a short period of time accepted legislation embodying the chief features that are to be considered characteristics of this law.

In view of the extensive vogue which this measure has enjoyed and of its present strongly entrenched position on our statute books, we should examine it with some care to see what are the distinctive elements which it has introduced or emphasized in our co-operative legislation. This measure departs from the brief and general terms in which earlier bills

[4] The text of this act is presented in full as Appendix D.

[5] During this year Mr. Sapiro served as counsel for the Marketing Department of the American Farm Bureau Federation. This statute therefore became for a time the official farm bureau measure, and their support was instrumental in securing its passage in a number of states.

were frequently drawn and which prevent subsequent students from determining the exact intent of the framers of those laws. Mr. Sapiro has intentionally (one may suppose) adopted a didactic rôle and has included in his statute many phrases not strictly essential to its legal purpose, but designed to inform the law-maker, the jurist, and the general public as to its meaning and purpose. Thus, for example, as a declaration of policy (Section 1) we find the following:

> In order to promote, foster, and encourage the intelligent and orderly marketing of agricultural products through co-operation; and to eliminate speculation and waste; and to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; and to stabilize the marketing of agricultural products, this act is passed.

The author of the bill evidently was keenly conscious of the fact that such decisions as that in the Decorah Case [6] tended to enunciate a public policy for those states which might be cited elsewhere with harmful effect. Hence he felt it important that in the new act there should be a clear statement of the public policy of any state in which it might be passed. The same general intention is carried out in still greater detail in Section 5:

> Every group of persons contemplating the organization of an association under this act is urged to communicate with the Dean of the College of Agriculture of the University of Kentucky, who will inform them whatever a

[6] See pp. 220 and 337.

survey of the marketing conditions affecting the commodities proposed to be handled may indicate regarding probable success.

It is here recognized that agriculture is characterized by individual production in contrast to the group or factory system that characterizes other forms of industrial production; and that the ordinary form of corporate organization permits industrial groups to combine for the purpose of group production and the ensuing group marketing and that the public has an interest in permitting farmers to bring their industry to the high degree of efficiency and merchandising skill evidenced in the manufacturing industries; and that the public interest urgently needs to prevent the migration from the farm to the city in order to keep up farm production and to preserve the agricultural supply of the nation; and that the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind, unscientific and speculative selling of crops; and that for this purpose, the farmers should secure special guidance and instructive data from the Dean of the College of Agriculture of the University of Kentucky.[7]

Much as Section 5 had sought to offset the effect of former court decisions, the last paragraph cited above was calculated to anticipate legal objections which might be raised in the process of adjudication

[7] This provision relative to investigation by the state agricultural college was apparently borrowed from the Oregon law of 1915, which read as follows: *"Preliminary Investigation.* Every group of persons contemplating the organization of an association under this Act are urged to communicate with the Director of the Bureau of Organization and Markets of the Oregon Agricultural College, who shall inform them to the best of his ability as to whether or not a survey of the locality and marketing conditions indicates that the proposed association is such as to succeed and meet the needs of the neighborhood in which it is to be established." (*General Laws of Oregon,* 1915, Chapter 226, Section 2.)

of this law on the ground that it was in effect class legislation. Hence this statement that there was a real distinction which the state desired to recognize as a matter of public policy, making it the basis of classification which presumably the courts would uphold as reasonable and proper. How fully this hope has been realized we shall see in Chapter XVI.

This act differs from the Department bill discussed in the previous chapter in that it authorizes associations with capital stock as well as those without. It does, however, stress the idea of personal participating membership and the non-profit character of the organization.

III. MEMBERSHIP QUALIFICATIONS AND VOTING POWERS

As to membership, the chief provisions of the Bingham Co-operative Marketing Act are as follows:

The term "member" shall include actual members of associations without capital stock and holders of common stock in associations organized with capital stock. (Section 2b)

No association . . . shall handle the agricultural products of any non-member except for storage. (Section 6a)

Under the terms and conditions prescribed in the by-laws adopted by it, an association may admit as members, or issue common stock to, persons only engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive

as rent all or part of the crop raised on the leased premises. (Section 7a)

Articles of Incorporation shall set forth:

If organized without capital stock, whether the property rights and interest of each member shall be equal or unequal; and if unequal, the general rule or rules applicable to all members by which the property rights and interests, respectively, of each member may and shall be determined and fixed; and provision for the admission of new members who shall be entitled to share in the property of the association with the old members, in accordance with such general rule or rules. (Section 8f) [8]

By-laws may provide:

The amount of entrance, organization and membership fees, if any; the manner and method of collection of the same; and the purposes for which they may be used. (Section 10g)

The number and qualification of members or stockholders of the association and the conditions precedent to membership or ownership of common stock; the method, time and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members and of the shares of common stock; the conditions upon which and time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association; and the mode, manner and effect of the expulsion of a member; the manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or stockholder, or upon the expulsion of a member or forfeiture of his

[8] The reader will doubtless recognize this as a provision of the California law of 1909 (see Appendix B). This is also true of many of the features of Section 10i.

membership, or, at the option of the association, the purchase at a price fixed by conclusive appraisal by the board of directors. In case of the withdrawal or expulsion of a member, the board of directors shall equitably and conclusively appraise his property interests in the association and shall fix the amount thereof in money, which shall be paid to him within one year after such expulsion or withdrawal. (Section 10i)

It will be observed that these membership requirements are substantially identical with those of the Department bill in that they limit membership to persons actively engaged in the production of the product dealt in by the association. The new act, however, is more strict in the limitation which it places upon dealing with non-members. It stipulates that the products of non-members shall be taken only for storage,[9] whereas the Department bill provided that the association, as agent for a non-member, might buy and sell for him and impose upon him any liability not in excess of the liability of the member, but in no case charge for such services more than their actual cost, including overhead.

As to control of the association, the Bingham Act lays down the one-man-one-vote rule, but provides that by-laws may prescribe "the right of members or stockholders to vote by proxy or by mail or both,

[9] The insertion of this provision is presumably due to the fact that it was intended that co-operative associations formed under this act should operate tobacco and other warehouses, and it was thought desirable that they be eligible for license under the Federal Warehouse Act, which requires licensees to operate as public warehouses.

and the conditions, manner, form, and effects of such votes."

IV. DEFINITION OF "NON-PROFIT"

While this law does not insist on the non-stock form of organization, it does both provide for and attempt to define a non-profit plan of operation. It says: "Associations organized hereunder shall be deemed 'non-profit,' inasmuch as they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers." This is a point not specifically covered in the Department bill. However, the definition here given is completely in harmony with expressions introduced in the Congressional debates on the Clayton Act, to which that law was supposed to conform.[10]

V. THE MEMBERSHIP CONTRACT AND ITS ENFORCEMENT

In many quarters it is considered that the most distinctive features of laws of this type are those which concern the membership contract and its enforcement. As will be explained fully in a later chapter (pp. 183ff), the member contract or equivalent by-law provisions had long been in use, but were not given specific authorization either in laws of the Rochdale type or in the California laws of

[10] *Congressional Record*, 63rd Congress, 2nd Session, pp. 9548, 9578.

1895 and 1909. The debates in Congress over the Clayton Act indicate that co-operative associations had never been under the ban of our anti-trust laws merely by reason of their *form* but that, on the other hand, such exemptions as were expressed in the Clayton Act were not such as to remove their *actions* from whatever penalties they might otherwise incur under the Sherman Act.[11]

The Solicitor of the Department of Agriculture evidently felt that it had also been made clear that the signing of binding contracts by members did not in itself constitute restraint of trade, and therefore included in his draft bill clauses definitely authorizing such procedures. Mr. Sapiro, however, went considerably further in this direction. He believed that the contract revocable in any year (which reflected the practice of the California Fruit Growers' Exchange) was by no means adequate to meet the situation. On this point his own view was expressed in the following words:

> It will be no fly-by-night stuff, no one-year contracts; but five years or nothing. You have tried the other system for three or four generations, and you see where it left you, you see how independent you are today.[12]
>
> The contract should always be a long-term agreement. It is impossible for farmers in a period of less than three years to develop a trained personnel, to perfect the process of receiving the commodity, to make good and wise

[11] *Congressional Record,* 63rd Congress, 2nd Session, pp. 9540-9545.

[12] North Carolina Extension Service, *Extension Circular No. 110,* July, 1921, p. 14.

commercial connections and to effect satisfactory banking arrangements. The rule is rather sound—a short-term contract is hardly worth the paper it is written on. A long-term contract gives the farmer a chance.

There should be no right of withdrawal whatsoever, except at the end of a specified long term. If the farmers intend to try the co-operative marketing system they should go into that work seriously, earnestly and on a permanent basis.[13] They should not dabble with the subject as though it were some new nostrum or patent medicine.

Therefore contracts range from three to fifteen years. Five years seems to be the fashion with the farmers of the country in the new organizations.[14]

The Department bill had provided that by-laws might require members to deal exclusively through the association and might fix liquidated damages in the case of the member's failure to perform such obligations, provided the member might withdraw by giving notice to the association "during a rea-

[13] Having read this chapter in manuscript, Mr. Sapiro (December, 1925) penciled on the margin: "I am not opposed to short-time contracts or withdrawal arrangements *after* initial term contracts have built up an organization and demonstrated co-operation." This is a view with which the present writer also is much in accord. I was instrumental in having the one-year limitation of the Department bill inserted in the Iowa co-operative law of 1921. So far as I am aware this has not militated against the success of a co-operative organization in that state in any specific case. Nevertheless, it seems to me that as a general proposition it would be wiser to provide that an association might make its contracts irrevocable during an initial period of perhaps three years and the arrangement for an annual withdrawal period effective thereafter. In the present volume, however, we are not attempting to argue the contract issue upon its economic or commercial merits, but simply to present the view of co-operative leaders at the time that legislative authority was sought and to see how much rope the legislatures and courts have in fact given to co-operative organizations.

[14] *The Country Gentleman,* September 8, 1923, p. 20.

sonable period of each year." Section 17 of the Bingham Act differs sharply from the provisions of the Department bill not merely in the longer time for which the contract might be drawn, but by providing also clearly for the "sale and resale" type of contract, whereas the Department bill had contemplated only an agency relationship. The marketing contract section of the Bingham law reads as follows:

> The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over ten years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association, or any facilities to be created by the association. If they contract a sale to the association, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded liens, to the association upon delivery; or at any other specified time if expressly and definitely agreed in the said contract. The contract may provide that the association may sell or resell the products delivered by its members, with or without taking title thereto; and pay over to its members, the resale price, after deducting all necessary selling, overhead and other costs and expenses, including interest on preferred stock, not exceeding eight (8) per cent per annum, and reserves for retiring the stock, if any; and other proper reserves; and interest not exceeding eight (8) per cent per annum upon common stock. (Sec. 17)

We have noted above that in the Department bill it was thought worth while to make specific mention of liquidated damages as a means of enforcing the member's obligation to deal with his association,

ending the section with the phrase: "Any such provision shall be valid and enforceable in the courts of this state." The drafters of the "standard marketing act" evidently believed that it would be expedient not merely to have the legislators declare their minds on this matter for the future guidance of courts in case of litigation, but to authorize specifically certain remedies which associations might invoke in the event of a breach of their marketing contracts. This included not merely liquidated damages to be collected after the fact, but also injunction in the case of a threatened breach of the contract and specific performance thereof. In view of complications growing out of the landlord-tenant situation in the Southern states it was desirable also to make the obligation binding upon the owner of the land. These provisions were embodied in Section 18, which reads as follows:

(a) The by-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees, in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts of this State; and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties.

(b) In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent

the further breach of the contract and to a decree of specific performance thereof. Pending the adjudication of such an action and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member.

(c) In any action upon such marketing agreements, it shall be conclusively presumed that a landowner or landlord or lessor is able to control the delivery of products produced on his land by tenants or others, whose tenancy or possession or work on such land or the terms of whose tenancy or possession or labor thereon were created or changed after execution by the landowner or landlord or lessor, of such a marketing agreement; and in such actions, the foregoing remedies for non-delivery or breach shall lie and be enforceable against such landowner, landlord or lessor.[15]

Furthermore, experience had shown that outsiders personally interested in the handling of the several products frequently offer special inducements to members to sell to them instead of delivering to their own association. A third line of defense, therefore, was proposed in two sections of the Bingham Act, aimed directly at persons outside the association who might engage in activities designed to discourage the member from living up to his marketing contract.[16] These sections read as follows:

[15] The constitutionality of this last section has been attacked. (See footnote on p. 204.)

[16] While these several enforcement provisions were new to most of the states which adopted the "standard marketing act," they were not particularly novel in Kentucky, substantially identical provisions with reference both to members and outsiders having been incorporated in marketing statutes enacted in that state in 1906, 1908, and 1910. Compare p. 159, footnote on p. 206, and p. 350ff.

Sec. 26. Any person or persons or any corporation whose officers or employees knowingly induce or attempt to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spread false reports about the finances or management thereof, shall be guilty of a misdemeanor and be subject to a fine of not less than one hundred ($100) dollars and not more than one thousand ($1,000) dollars for each such offense; and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred ($500) dollars for each such offense.

Sec. 27. Any person, firm or corporation conducting a warehouse within the State of Kentucky who solicits or persuades or permits any member of any association organized hereunder to breach his marketing contract with the association by accepting or receiving such member's products for sale or for auction or for display for sale, contrary to the terms of any marketing agreement of which said person or any member of the said firm or any active officer or manager of the said corporation has knowledge or notice, shall be liable to the association aggrieved in a civil suit in the penal sum of $500.00 for each such offense; and such association shall be entitled to an injunction against such warehouseman to prevent further breaches and a multiplicity of actions thereon. In addition, said warehouseman shall pay to the association a reasonable attorney's fee and all costs involved in any such litigation or proceedings at law.

This section is enacted in order to prevent a recurrence or outbreak of violence and to give marketing associations an adequate remedy in the courts against those who encourage violations of co-operative contracts.

It will be observed that, while the "standard act" makes only minor changes in existing statutes so far as the handling of capitalization, voting, and the distribution of pecuniary benefits are concerned,

it does depart from them very sharply in the greater degree of control that it attempts to set up over the commodity which the association is designed to handle and in restricting the rights of both members and outsiders with reference to it. These control features of the law naturally raise the question whether organizations so constituted are monopolistic or in restraint of trade.

In the "standard act" it was thought wise to have the legislature declare itself specifically to the effect that associations organized under the act or contracts authorized in the act should not be deemed illegal or in restraint of trade. We shall not be in a position to consider this problem adequately until we examine further the commercial procedures which have developed in actual practice under laws of this sort. So far as it is possible to separate the two issues we have, up to the present point, been limiting our discussion to structure rather than function in order to see the form of organization which has been gradually coming to recognition in our enabling acts. In subsequent chapters we shall examine more fully the distinctive practices of co-operative associations and the views which have been taken concerning these practices by the courts when the process of litigation has brought them under judicial review.

VI. SUMMARY

The attempt has been made in Chapters II, III, IV, and V to set forth those general features in the structure of the co-operative associations which have been provided under our several laws to carry out the economic purposes of those who have sought to develop a new form of business organization corporate in form and yet differing from the ordinary profit-seeking enterprise. What has been accomplished in the way of distinctly co-operative structure may be conveniently summed up under three heads.

(1) As to the handling of the capital stock problem, three different situations are to be recognized: (a) the use of a single class of capital stock, non-transferable or with limited transferability, and so restricted as to voting power and/or size of holdings as to preclude concentration of control in the hands of a single individual or small group;[17]

[17] Mr. J. G. Mitchell comments on this phrase as follows: "This implies a presumption that 'concentration of control' is obtainable only by the accumulation of capital stock. This is not so in ordinary experience and the statutory provisions set out would not only have such a tendency but, in my opinion, were advocated with that express purpose." It is true, of course, that actual control in a co-operative association might become concentrated in the hands of a small number of influential individuals even though each member or holder of common stock had an equal vote. The affairs of an association of a hundred thousand members scattered over several states cannot be conducted on the town-meeting principle. Hence, in the selection of trustees and the determination of such policies as are passed upon at general meetings, some minority group, perhaps quite small, might conceivably obtain a dominating influence even though the principle of democratic voting is strictly ad-

(b) the issuing of common stock of nominal value to active patron members of the association only, with equal suffrage for such members, and preferred stock sold both to members and outsiders for the purpose of raising capital, but carrying no voting right or a right so limited as to keep this creditor group in a minority position; and (c) the pure and simple membership corporation without capital stock, but with non-transferable voting membership for active participants in the business of the association, capital needs being met by the borrowing of funds from the members on the basis of membership loan certificates and from members or others in the form of bonds, mortgages, bank credit, and other means of outside financing.

(2) In the matter of costs, earnings, and profits, two types of association have developed: (a) those that buy from their members at a stipulated price, sell to such advantage as they can, and return any profit to their members as a patronage dividend; and (b) those which perform service for their members for a charge equal to direct and overhead cost. It

hered to. The view, however, that this plan of organization was devised for the express purpose of concentrating control seems to me to be neither historically nor logically tenable. Furthermore, the hold over the association acquired by any particular group, however powerful it might become, could be broken whenever the membership desired to bestir itself—quite in contrast to the condition where control was made absolute through the purchase of a controlling stock interest. It is different also in that even the minority group would themselves be a part of the membership whose interests were identified with those of the association as a whole rather than being outsiders who had simply secured entrance through the purchase of property rights

has already been pointed out that the first type of associations are not strictly non-profit and hence not, to the purist, truly co-operative. It is equally true, however, that associations of the second type find themselves confronted by serious practical difficulties in attempting to carry out literally their ideal of service at cost. It is comparatively easy to restrict by legal enactment or by-law provisions the rate of return allowed upon invested capital. It is distinctly more difficult to devise a form of organization under which members of the association shall neither benefit nor lose from transactions with non-members, or under which each member shall be able to identify and secure just the degree of benefit to which his individual portion of the business is entitled. Some of the problems thus raised will be examined further in the following chapter.

(3) A distinct characteristic of all co-operative organizations is that they are based upon patron membership. Earlier laws frequently did not safeguard control in the hands of such members either by restricting the transferability of stock or by divesting it of voting power when the owner ceased to be an active patron of the association. Later laws show some trend, though not uniform and consistent, toward putting control and the sharing of benefits exclusively in the hands of patron members, that is, those actively participating in the business served by the association.

The excluding of non-participants from control

and financial benefit is merely the negative side of the membership feature of co-operation. On its positive side it involves active and consistent support of the association and use of its facilities by the members for whose mutual help it has been set up. On this positive side there has been a marked tendency to lay greater stress on the contractual obligation of the member to his co-operative organization. In fact, it would not be too much to say that under the latest laws the co-operative is conceived structurally as a mutual company made up of individuals carrying on a common line of production and merged into this joint agency by a definite contractual bond involving support of it with funds and patronage and the sharing pro rata in its benefits.

This characterization of co-operative organization obviously raises the question of the degree of control over the business of its constituent members which is acquired by the co-operative. The nature of this control, the devices by which it is secured, and the manner in which it is exercised will be discussed in some detail in Chapters VII, VIII, and IX. It is evident, however, that the economic importance of whatever degree of control is acquired will depend quite largely on the possibilities for growth in size which is provided under the several types of co-operative laws. We have frequently referred to co-operation as a means of effecting large-scale organization in agriculture. Three gen-

eral designs have been followed in the building of these more ambitious structures. We shall now glance back over the history of our co-operative law and practice to note the characteristics and differences of these three methods and also the possibility of blending them or utilizing still other procedures for securing the larger growths in the direction of either vertical or horizontal integration.

CHAPTER VI

FEDERATION, CENTRALIZATION, AND TREATY

The older period of co-operative organization in the United States was dominated by the local co-operative association organized generally in greater or less conformity with the Rochdale principles. The economic function which it performed was chiefly that of assembling and shipping products from a local station. In some cases, notably the co-operative creamery, the local processing plant assumed outstanding importance. While co-operation on these strictly local lines has served a distinct purpose in achieving greater economy and efficiency in the assembling of suitable commercial lots for consignment to central markets, there are two distinct needs for overhead organization which are likely to develop before co-operative organization can go far on the road toward commercial effectiveness. The first of these is for an overhead service agency which shall assist on problems of organization and management; furnish audits, legislative assistance, or insurance; collect claims; or perform like services which can be provided economically and efficiently only on a group basis. The second

need is for organization of these smaller groups into some common agency either for market representation, for collective bargaining as to price, or for actual selling and sales promotion in the central markets.[1]

Our chapter heading indicates that such overhead organizations have been built up under three general methods: (a) federation, (b) centralization, and (c) treaty. The first two of these terms have long been in use in co-operative discussions. The third is taken by analogy (perhaps too violently) from the usage of political science.

The principle of federation is well worked out in the political system of the United States. A large degree of local self-government is left to school districts, townships, counties, and municipalities at the same time that a desirable degree of uniformity within a larger district is secured through the suzerainty of each of the 48 almost "sovereign" states. Certain functions, however, in which national uniformity and centralized control are deemed to be important, such as currency, military defense, tariff restrictions, and the like, are entrusted to a central government agency created by the delegation of such

[1] We mention merely the selling function here because it has been by all means the most important. Such a central agency, however, may be set up for the purpose of joint buying, or even for the manufacture of supplies for the local processing organizations or individual members. The maintenance of a large central warehouse is a need which frequently calls for the participation by numerous local co-operative groups in some larger regional enterprises.

specifically enumerated powers by the 48 federated states.

In contrast to this system, the French government is centralized, having a single national authority divided among administrative departments for reasons of convenience. These *departements,* however, are not autonomous as are the states of the American Union. They in turn are divided into smaller districts, the *arrondissements,* which, however, are not self-governing local units, but mere administrative sub-divisions.

Finally, on matters of international concern sovereign nations, whether of the federated or centralized type, may join themselves together for united action in such enterprises as can be carried through only, or most advantageously, by joint action. Such affiliations are provided by special treaty. A good illustration of large-scale commercial operations carried on under international treaty is to be found in the International Postal Union.

We have no desire to strain this analogy beyond its proper field of usefulness. But it may serve to indicate roughly the nature of these three methods for organizing large numbers or wide areas for joint action, and may shed some light on the problem of co-operative organization and government.

I. FEDERATION OF LOCALS

It is doubtful whether the word "federation" has ever acquired a fixed and definite usage in the vocab-

ulary of the co-operatives. Even where provisions calculated to make federation possible have been inserted in co-operative laws, the term itself has not been introduced, so far as the writer is aware, except in the Iowa law of 1921.[2] It seems to have been taken for granted, however, that local co-operative associations would have the inherent right of joining themselves into such overhead associations as they might find convenient for the carrying on of their business. Even where locals were incorporated under general corporation laws or co-operative statutes of the Wisconsin (1911) type the overhead organizations were frequently merely unincorporated associations of a very loose and informal type.

Perhaps the most important illustration of rudimentary federations is that of the state farmer grain dealer associations. Their formation began in 1903 and thus antedated the passage of co-operative laws in most, if not all, of the states where they were first established. They merely collected membership dues and service charges from such associations as saw fit to affiliate with them. Even down to the present there has been practically

[2] "Likewise associations may be formed under this act whose membership shall consist of other associations formed under the provisions of this act, the purpose being to federate local associations into central co-operative associations for the more economical and efficient performance of their marketing or other operations. Such central associations may enter into contracts, agreements, and arrangements with their member associations. Each member association in such federated associations shall have an official representative chosen by its own board of directors, who shall cast one vote and no more at all business meetings of the federated association." *Code of Iowa*, 1924, Secs. 8499 and 8500.

no delegation of authority from local associations to such overhead organizations covering the time or method of selling, routing of shipments or choice of market, insurance of property, auditing of accounts, selection or control of employees, or any other matter touching the actual conduct of their business. They do, however, represent a joining of local associations for concerted action on any matter in which they have a common concern, such as income tax legislation, the adjustment of freight rates, warehouse legislation, or the like.

Where a group of these associations elect to procure accident and liability insurance through their state association they have in effect made it a joint buying agency, and there would seem to be no reason why they might not proceed in the same manner to delegate numerous other powers in connection with the technical management of local plants, the actual distribution of product, the gathering and dissemination of market information, and the collection of accounts. In practice they have frequently used the state association as a means of auditing freight bills and collecting overcharge or damage claims. In general, however, when local organizations of this type have undertaken either joint selling or joint buying operations, they have thought it best to organize a separate affiliated company, such as the National Farmers' Elevator Grain Company Co-operative now in process of development, or the Farmers' National Co-operative

Mutual Insurance Association, which has been in successful operation for some years. The fact that these latter enterprises represent business of an interstate character is probably a partial explanation of their independent organization. However, the same practice has generally been followed where state elevator groups have undertaken the joint buying of supplies, such as coal, fertilizer, twine, and the like.

In a word, then, the federation principle properly speaking—that is, the actual delegation of powers by local associations to a state or other overhead organization—has proceeded but feebly in most parts of our co-operative movement. A number of organizations have been set up for the performance of particular commercial functions for such local bodies as might care to avail themselves of these services on a mere fee basis, the locals being free to purchase this service without any specific authorization in the law. The self-governing character of the local associations has been preserved to a high, possibly even to a harmful, degree. Since they have moved so slowly and cautiously toward the delegation of any of their powers, it is not strange that legislation has failed to set forth clearly any plan by which local, regional, and central organizations might definitely set up a comprehensive integrated structure for handling the given line of business.

Legislative expression on federation apparently

began with the Wisconsin law of 1887. It provided that "members of any such association, or the association itself, may own shares in any similar association . . . provided that the association, as such, may own as much as one-third of the capital stock of any similar association; but no association shall have more than one vote in the management of the affairs of any other association in which it may be a shareholder."

In 1905 a clause was introduced into the co-operative statute of Minnesota, permitting associations to "buy and hold stock in other corporations organized for the same general purpose." [3] Examination shows that problems were arising in the business of the co-operative associations which called for clear legislative pronouncements on this matter and the definite authorization of associations for joint action by local bodies. The Minnesota law of 1907 was a direct outgrowth of the belief that, if the elevators and warehouses being established under the auspices of the American Society of Equity were to achieve the purposes for which they were designed, they must have district and state organizations or "exchanges" [4] which would enable them to concentrate both buying and selling opera-

[3] *General Laws of Minnesota,* 1905, Chapter 276.

[4] By contrast, the extremely local character of some of the earlier development is shown in the fact that the co-operative creamery law of 1897 (see Chapter II, p. 44) not merely limited capitalization to a maximum of $25,000, but also provided that all the incorporators must be "residents of the county in which the corporation . . . has its plant."

tions in such a way as to secure direct price advantages.[5] This purpose of the Minnesota law of 1907 to create larger collective bargaining units of the federated type is shown also in the general purpose clause, providing "that any co-operative association may be formed for the purpose of selling and otherwise disposing of any product of any manufacturing or agricultural co-operative association organized under the provisions of Section 3073, Revised Laws, 1905, or Chapter 276 or 313, General Laws, 1905, and any amendments thereto." Such an association was "hereby authorized, in addition to those other powers to it granted, upon an affirmative vote of a majority of its stockholders, had at any regularly called annual or special meeting, to subscribe, through its officers, to the capital stock or any stock of any corporation organized under the provisions of this act, pay for the same and thereafter, in like manner, vote the same and exercise all the usual powers of a stockholder in a corporation, subject to the limitations herein before set forth."

The Wisconsin law of 1911 elaborated the federa-

[5] This explanation of the Minnesota development was furnished the writer by Mr. H. R. Searles of the Extension Department of the University of Minnesota, and is based on personal interviews with Colonel R. H. Wilkinson of Lake Elmo, Minnesota. Colonel Wilkinson further stated "that while he was pondering on the matter in 1906 he met Sir Horace Plunkett at Ogden, Utah, while on his way back from Idaho. He talked over his problem with Sir Horace Plunkett on the way back to Omaha and from him, through the work that Sir Horace had been doing, he got the idea of district and state exchanges."

tion principle in three sections. They conferred the same general power as that given in the earlier Minnesota laws, but modified in detail and so expanded as to specify the manner in which such transactions were to be carried out. These provisions came onto the statute books of a considerable number of states as a result of widespread copying of the Wisconsin law, although it does not appear that much practical use was made of them.[6] It may be noted too that the Texas Co-operative Societies Act of 1917, after stressing the "purely local character" of these associations, added:

> Provided that corporations incorporated hereunder may join with other corporations incorporated under this Act in establishing and maintaining joint agencies for the accomplishment of the purposes for which they are incorporated.

No definite provisions for the organization or regulation of such federations were made, however, and it appears that no advantage was taken of this general permissive clause.

The organization which is best known as a fully worked out scheme of large-scale federated type is the California Fruit Growers' Exchange. This system is based upon local packing houses, many of

[6] The Wisconsin Cheese Producers' Federation was organized (1913) under the provisions of the Wisconsin statute of 1911, and the Co-operative Livestock Central Commission Association at St. Paul under an essentially similar Minnesota law. On the other hand, the Michigan Potato Growers' Exchange, also an overhead selling agency, was organized under the "graveyard act" of that state, although there was at that time on the books a co-operative law of the Wisconsin (1911) type.

which organized for business and carried on the packing and shipment of their fruit before the development of the present exchange system. More and more as time has gone on, the locals have become concerned purely with the harvesting, grading, and packing of the product, delegating marketing functions to an overhead organization which could handle it more economically and effectively.[7] This has given rise to a number of district exchanges (now 22) which have nothing to do with the physical handling of the fruit, but which do undertake to study the markets and administer the distribution of shipments. These district exchanges in turn have found it expedient still further to centralize control of certain functions. They have accordingly federated themselves into a state exchange, which maintains a common selling agency in Eastern markets, attends to collections and the remitting of funds, controls a common trade-mark, conducts advertising and sales promotion work, and gathers

[7] "The principle of federation may be carried as far as the problems of an industry warrant. The farmers of a locality can group themselves into local organizations, these in turn can federate into district associations which handle the common problems of the local organizations, and the district associations in turn may federate into larger central co-operative unions which represent the district associations in handling the larger questions and the marketing policies for the entire industry. Like the large corporation, a central co-operative union representing a number of associations has a larger influence than a small group of farmers working alone in dealing with transportation, legislative, and other public policy questions, in the purchase of supplies, the distribution and sale of products, in the development of markets, and in preventing the enormous wastes of fierce and unrestrained competition." Powell, G. Harold, *Co-operation in Agriculture,* pp. 64-65.

market information which it transmits to the various district exchanges. These overhead services are rendered at cost, which is pro-rated to the local packing associations and thus charged back upon each unit of fruit handled.

The working out of the federated organization of the California Fruit Growers' Exchange was facilitated by the fact that both underlying and overhead organizations were all located within a single state. An interesting case of the opposite situation is found in the American Cranberry Exchange, which is a selling agency for three state organizations, which are themselves in turn federations of local co-operatives. The American Cranberry Exchange is a non-stock corporation, chartered under the laws of the state of Delaware, its membership being limited to growers of cranberries and officials of cranberry growers' associations. These members each pay a membership fee and are entitled to one vote each in the government of the central exchange. They are members also of their respective state companies, and the structure of the latter may be explained by a quotation describing the New England Cranberry Sales Company, the largest of the three state units.

The New England Cranberry Sales Company was incorporated originally in Massachusetts in 1907 and reincorporated in the same state in 1919. It is a non-stock and non-profit growers' co-operative organization. . . . The membership of the company consists of "persons,

firms, associations, or corporations engaged in the business of growing, packing, or shipping cranberries or their by-products." To become a member, a written application must be made to the board of directors and must be approved by two-thirds of the directors present and voting.

A membership fee of $20 is collected, half of which goes to the state association and half to the central organization. The dues are $1 a year. Each member is entitled to one vote. The state associations do not have specific membership contracts. However, "each member, until he ceases to be such, agrees to deliver and ship his entire cranberry crop under the rules and regulations of the company." In most cases it is recommended that members be required to sign contracts in addition to signing the by-laws. . . .

The companies have no capital stock. The state companies are allotted 2 per cent, deducted from sales f.o.b. shipping point, to cover operating expenses, while the central organization is allotted 5 per cent. In Massachusetts a reserve fund is maintained which consists of the unexpended balance of the 2 per cent allotment together with the company's share of the unexpended balance of the 5 per cent allotment to the central association. These unexpended balances are kept in the hands of the company for one or more years before they are returned to the growers in the form of sales expense refund. A small reserve of from $1,000 to $5,000 is maintained by the Wisconsin company on the same basis. In New Jersey a revolving fund is maintained by means of loans from members.[8]

[8] "Sales Methods and Policies of a Growers' National Marketing Agency," U. S. Department of Agriculture, *Bulletin No. 1109*, pp. 9-10.

The Federated Fruit and Vegetable Growers, Inc., faced an even more complicated problem not only because of the fact that their constituent members were scattered all over the country and organized under a variety of co-operative statutes, but also because they desired to handle in addition the accounts of a few individuals and ordinary business corporations. The Federated

The precise manner in which functions will be distributed and powers delegated in any given case is, of course, a matter of practical expediency and local experimentation. However, since the method of building up large-scale business organizations through the federation of local co-operatives has been a new development in American commercial practice and commercial law, it has been found desirable to have in the co-operative law at least a general statement indicating that such practices are contemplated and have been viewed with favor by the legislative body. The provision for the purchase of stock in other associations such as was developed in the early Minnesota and Wisconsin laws is not only incomplete as a statement of such policy but unsuited to the purposes of non-stock associations. This difficulty was met in the California law of 1909 by the insertion of the following clause:

653q. Each association incorporated under this title shall have the powers granted by the provisions of this code and other laws of California relating to private corporations, and shall also have the following powers: . . .

was very desirous of organizing under a law of the type of the Bingham (Kentucky) Act. However, in order to secure sufficient flexibility to handle these different situations and to develop an organization whose membership resided in more than a single state, it was decided to incorporate under the non-stock law of Delaware. Matters of co-operative practice such as are covered in state co-operative laws are in the case of the Federated covered by provisions of the certificate of incorporation and their by-laws.

3. Upon the written assent or by a vote of members representing two thirds of the total votes of all members to co-operate with any other co-operative corporation or corporations for the co-operative and more economical carrying on of their respective businesses, by consolidation as provided in section 653i of this code,[9] whereupon the effect of such consolidation shall be the same as declared in said section; or upon resolution, adopted by its board of directors, to enter into all necessary and proper contracts and agreements, and to make all necessary and proper stipulations and arrangements with any other co-operative corporation or corporations for the co-operative and more economical carrying on of its business, or any part or parts thereof; or any two or more co-operative corporations organized under this title, upon resolutions, adopted by their respective board of directors, may, for the purpose of more economically carrying on their respective businesses, by agreement between them unite in employing and using, or several associations may separately employ and use, the same methods, means and agencies, for carrying on and conducting their respective businesses.

It will be noted that this California law (besides direct consolidation) [10] suggests two types

[9] "653i. Two or more associations formed and existing under this title, or under any pre-existing law authorizing their formation for the same purposes, may be consolidated, upon such terms, and for such purposes, and by such name, as may be agreed upon, in writing, signed by two-thirds of the members of each such association.

"And from and after the filing of such certified copy, the former associations comprising the component parts cease to exist, and the consolidated association succeeds to all the rights, duties, and powers of the component associations [etc.]."

[10] This consolidation provision would apparently permit of the building up of large-scale centralized organizations by the direct coalescing of small units in the manner made familiar in the numerous "mergers" of ordinary corporate business. In practice, however, this provision has not been availed of by co-operatives to accomplish a similar result.

of inter-relation: first, that by specific contract or agreement, to which we shall presently refer under our "treaty" heading, and, second, the federated type of overhead agency. The statement with reference to the last is couched in the most general terms, leaving to by-law provisions or the subsequent operations of such a central agency the settlement of questions of function, financing, and control. Obviously in a non-stock association, control cannot be exercised by the voting of stock by the underlying organizations. In practice the California Fruit Growers' Exchange has handled the matter by giving one vote to the delegate of each member association, but providing also for a "Board of Representatives" to which controversial questions may be referred and in which voting is proportionate to the volume of business contributed to the Exchange.

When we come to the Department bill, we find it providing (Section 6j) that associations shall have power "to co-operate, through membership or otherwise, with any other association not conducted for profit, whether formed under this act, or otherwise, for the purpose of promoting any enterprise, which may be lawfully carried on, relating to the respective authorized operations of such associations, and which enterprise does not relate to or involve fixing wages, limiting production, destroying products, or fixing the selling price, or delegating the control, of the products of the members of either association."

Comment on the latter part of this clause will be reserved for subsequent chapters when we come to discuss the whole restraint of trade issue. The point here is that the Department bill specifically authorized inter-association organization "through membership or otherwise." Under our basis of classification only the former of these arrangements would be regarded as federal in character, others coming under the "treaty" heading to which we shall shortly refer. This would imply that in federations, properly speaking, the rule of equal voting would have to be observed, since Section 9 of the Department bill begins: "Each member shall be entitled to one vote only." This, it will be remembered, is the rule explicitly stated in the Iowa law of 1921 (see footnote page 123) and in the Wisconsin law of 1887 (see page 42).

In a word, then, co-operative federations are associations of associations.[11] They permit of integration of an agricultural industry horizontally by bringing together many local units of like character. They also permit integration vertically by the addition of functions, ordinarily those of central market or export selling, demand promotion, and packing or processing. In common usage the term frequently is made to include also what we have reserved for separate treatment in the third division of this chapter, namely, "treaty" arrangements.

[11] Occasionally, however, federations include as members certain large individual producers or shippers as well as local co-operatives.

II. CENTRALIZED MARKETING CO-OPERATIVES

Laws of the Kentucky type, on the one hand, and those of the Wisconsin (1911) and California (1909) types, on the other, proceed from quite divergent philosophies of co-operative organization. The latter favor what is sometimes called a democratic [12] system, owing to the fact that complete control of the whole marketing process is conceived to reside originally in the local association, district and central units deriving their powers only through the delegation of specific authority by the locals. The Kentucky type of law, on the other hand, favors centralization and direct control.

Nevertheless it would be difficult indeed for anyone who sought to gain an understanding of the various phases of co-operative organization merely from a study of the laws to get any adequate clue to these differences. The pertinent provisions of the Kentucky Co-operative Marketing Act are as follows:

Sec. 6. Each association incorporated under this act shall have the following powers:

(d) To purchase or otherwise acquire; and to hold, own, and exercise all rights of ownership in; and to sell, transfer or pledge, or guarantee the payment of divi-

[12] It would be a more correct usage to describe such a system as local autonomy rather than democracy. Certainly a centralized type of government may be as truly democratic as a decentralized system, provided only the individual member has an opportunity to express himself adequately on matters of general policy and is equitably recognized in the selection of a representative body of directors who shall legislate for the organization as a whole.

dends or interest on, or the retirement or redemption of, shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the warehousing or handling or marketing of any of the products handled by the association.

Sec. 7.

(b) If a member of a non-stock association be other than a natural person, such member may be represented by any individual, associate, officer or manager or member thereof, duly authorized in writing.

(c) One association organized hereunder may become a member or stockholder of any other association or associations organized hereunder.

There is no marked dissimilarity between these provisions and others cited in the previous section as designed primarily to facilitate the federation of locals into large overhead organizations. It was just as possible for the raisin growers to form a centralized association under the California law as it was for the citrus growers to build up a federated system. Likewise it would be quite as possible for farmers' elevators in Illinois to develop a comprehensive grain marketing scheme under a law of the Kentucky type. There would simply be a difference of procedure.

We have indicated sufficiently how local marketing groups might be organized with all the marketing functions in their own hands, how they might decide which of these (chiefly physical handling) they could perform effectively through a local organization, and thereafter delegate those which need to be handled on a group basis to such district

and central federations as seem to be called for.

In the case of a centralized association, retention of control over distribution and price-determining policies is the function which is regarded as paramount. Incidental to this there arise various questions as to how the actual assembling, storing, processing, financing, and so forth are to be most effectively performed. Under the general principle of division of labor it will commonly be found desirable to delegate such functions to subsidiary organizations, which may or may not be local in their character. In the case of tobacco and milk it is highly important that such plants be so centralized and so distributed geographically as to get maximum efficiency for the group regardless of individual convenience or local preference. In such cases it may be desirable to have a warehousing or processing corporation co-extensive with the marketing company. This has seemed clearly to be the case with raisins and largely so with fluid milk.

In the case of cotton we have an interesting situation much more analogous to that of the farmers' elevator or co-operative creamery territory. The local gin does in fact perform important local functions and becomes a convenient agency, therefore, for some form of local organization with active interest and participation of its own, but with some close-knit affiliation to the central organization. It is comparatively easy to see how cotton organizations might have proceeded on the federated

principle if the organization of locals had developed early in somewhat the same manner as the farmers' elevator or co-operative creamery movement. The problem is now being faced by the Texas Farm Bureau Cotton Association of developing these local units not alone for the direct advantage that members will receive through ginning on a co-operative basis, but also for the greater strengthening of the central organization through the stimulation of local interest and participation.[13] Apparently in

[13] "The gin is the industrial center of the cotton community. We expect to do a good many things towards the ownership of these gins. The marketing association will help the local members in financing the building of the gins. In exchange for that assistance on the part of the marketing association we will maintain a supervision over the gins, and require them to perform certain services for the marketing association, one of which is that of performing the clerical work in connection with the delivery of the cotton. . . . In addition to that, good ginning is necessary to sell cotton at a good price. . . . Often the ginner is more interested in making money than in doing good ginning. Next, the cost of ginning has been too high. We have known many cases where groups of farmers have got together and operated gins, owned either privately or co-operatively, and have paid for a $40,000 or $50,000 gin in less than two seasons. During the past year many of them that had been operated for two years paid as much as five dollars a bale in patronage dividends. The cost of ginning is seven or eight dollars a bale, so that the gin as an investment is a good thing, where it has assumed volume. . . .

"Furthermore, it gives the membership a sense of local ownership, and a share in the business of co-operative marketing which they can see. In the State of Texas we have many members 500 miles away from the central office. They are not accustomed to traveling a great deal, and, therefore, it is very difficult for them to see any physical evidence of their own organization. Not only that, but the distances being so great it is hard for the officers of the association to find time to visit them very often. So that they have a very remote conception of the organization." Moser, C. O., "Principles and Practice of Commodity Marketing," *American Co-operation,* 1925, Volume II, pp. 676-677.

such cases we shall arrive at a system of dual membership in which the individual grower would join both the local gin association and the central cotton marketing association. Reverting again to our political analogy, this situation would not be essentially different from that prevalent in the United States where one has both state and Federal citizenship.

In terms of the distribution of authority, however, two rather distinct systems may develop. It will be observed that in the Texas cotton situation it is expected that the central selling agency will serve as a promotional agency with reference to the location and organization of local gin associations, that it will assist them in their financing, and will retain some control over their subsequent operations. This would create a situation about half-way between the two possible extremes. On the one hand would be the centralized association retaining complete control of local processing plants, locating them where it saw fit, and controlling their operation as a part of the centralized marketing machinery. At the other extreme would be the central association having direct membership relations with producers who, however, also own a local assembling or processing plant formerly quite independent in its operations, but now tied to the central association by some sort of contract to handle product through it alone, or at least send it all the product of producers in its territory who hold membership in the

central. The first situation can be seen in the experience of some of the Canadian wheat marketing organizations, and in this country was illustrated by the Equity Exchange, whose experience, however, failed to demonstrate the desirability of this method. The second situation is illustrated by several wheat pools which have utilized local farmers' elevators for handling the product of their members. As this, however, is on a purely contractual basis, it falls properly under the next heading of our present chapter.

Before going on to discuss such "treaty" arrangements, a word should be said of the method by which members exercise control in the centralized type of association. In such organizations there may be as many as 50,000, 75,000, or even 100,000 members. They may be scattered over several states and never have seen the offices, officials, or physical plant of the association. It is not possible to secure the attendance of any large proportion of them at the annual meeting of the association or at specially called meetings. If they are to have any intelligent views as to how the business of the association should be conducted and to express themselves in any effective way in what is supposed to be a democratic type of organization, it is necessary that some form of local groups shall be set up and direct voting for locally representative directors be provided.

The first point has not been covered specifically

in law, but in practice the larger associations have organized county or other local associations for the cultivation of interest in and understanding of the work of the association. They afford a meeting place where its affairs may be discussed, information transmitted from headquarters, and the grievances or suggestions of members crystallized and transmitted to the central office. These or other suitable units are also utilized for the election of directors. The method of district voting was first outlined in laws of the Kentucky type. Here it is provided:

> The affairs of the association shall be managed by a board of not less than five directors, elected by the members or stockholders from their own number. The by-laws may provide that the territory in which the association has members shall be divided into districts and that the directors shall be elected according to such districts, either directly or by district delegates elected by the members in that district. In such a case the by-laws shall specify the number of directors to be elected by each district, the manner and method of reapportioning the directors and of redistricting the territory covered by the association. The by-laws may provide that primary elections shall be held in each district to elect the directors apportioned to such districts and that the result of all such primary elections may be ratified by the next regular meeting of the association or may be considered final as to the association.[14]

[14] In this connection the provision for election of officers is also interesting: "The directors shall elect from their number a president and one or more vice-presidents. They shall also elect a secretary and a treasurer, who need not be directors or members of the association; and they may combine the two latter offices and designate the combined office as secretary-treasurer; or unite

It has sometimes been assumed that the centralized type of large-scale co-operative is the only form of organization capable of achieving the purposes of modern "commodity marketing." This is by no means true. As large and as efficient a group may be built up under the federated form. Both types of organization have their particular field of usefulness, and this depends in the last analysis on the nature of the product to be handled. This is strikingly illustrated by the fact that the wool growers of the fleece wool states—the heart of the old Rochdale territory—spontaneously developed centralized associations, finding this the only practical means of organizing for the handling of their commodity.

Wherever a local assembling, storage, loading, or processing plant is called for by the character of the commodity handled or the organization of the trade through which it is distributed, there is a good opportunity for identifying both the moral and financial interest of the community with a tangible and actively functioning unit of the system. In other cases, however, storage and processing must be handled at central points if the work is to be done efficiently and economically, and in all cases control of actual distribution must be centralized

both functions and titles in one person. The treasurer may be a bank or any depository and, as such, shall not be considered as an officer, but as a function of the board of directors. In such case, the secretary shall perform the usual accounting duties of the treasurer, excepting that the funds shall be deposited only as and where authorized by the board of directors."

to a considerable degree if any comprehensive and effective plan is to be carried out.

Tobacco and fluid milk appear to be two outstanding cases in which centralized organization is indicated. With them, centralized bargaining, handling, and financing functions are highly important and local plant and function practically negligible. In such cases, therefore, organization naturally proceeds in the direction of a strong centralized marketing agency with which the individual grower has direct membership relations.[15] As for others, we shall probably find that, given certain peculiar circumstances of time, place, and personal leadership, it is about equally possible to work forward from local independent units to a coherent and comprehensive marketing system or backward from an ambitious centralized beginning to effective and complete organization of the whole industry through the addition of local participating units.

So far as the law is concerned, practically the only points which need mentioning even are those covering the election of directors by districts, and in stock associations the ownership by the central association of stock in local subordinate organizations. We have observed the manner in which these provisions have been incorporated in the statutes of our several states.

[15] Such organizations, however, often need to establish ownership control or active participation in numerous other warehousing, processing, financing, supply-buying, or other auxiliary organizations.

III. TREATY ARRANGEMENTS OF CO-OPERATIVES

Parts I and II of this chapter have dealt with the more formal and permanent structural arrangements by which co-operatives achieve large-scale organization. We have intimated at several points in the discussion that the co-operative organization of the several branches of agricultural industry may proceed also by the linking up of shipping units, processing plants, warehouses, finance organizations, selling agencies, and the like in more flexible relationships with a less complete or permanent bond between them. It has seemed to the writer that such inter-association dealings partake rather of the character of the special treaty arrangements entered into by independent political jurisdictions. They are simply the special agreements by which co-operatives work together while at the same time they retain a desirable degree of freedom in operating their several individual associations.

We have called it a federation when a group of farmers' elevators "join" a state association which they maintain permanently as a common overhead agency for auditing, claim adjusting, legislative service, or whatever. The same result, however, may be accomplished by mere agreement between individual locals and some service agency connected with an entirely different type of organization. For example, livestock shipping associations may secure auditing and business analysis service from a de-

partment of their state Farm Bureau Federation set up expressly for the purpose of rendering high class service at minimum cost by serving all types of local co-operatives within the state. In a similar way it is possible for poultry and egg shipping associations to make agreements with creameries for warehousing and shipping the product of their members, or to contract with the selling organization of a distant centralized poultry producer organization for handling their eggs on a distant market. This would get them high class market representation and at the same time obviate establishment of a selling organization of their own.

In fact, the complete co-operative *system* of a region is likely to present a combination of all three methods. Local shipping associations may be federated into a state service agency, may sell all or part of their product through a centralized marketing pool, and may secure warehousing, financing, or other service through a warehouse, finance, or other corporation organized as a subsidiary of one of the overhead associations, entirely independent, or affiliated with a general farmers' organization. Through such devices it has become possible in theory, and is gradually being worked out in practice, that the commercial producers of an agricultural region may organize the distributive end of their business (including necessary auxiliary functions) on a basis not less comprehensive or efficient than that which is achieved by corporate industry in the non-agri-

cultural field.[16] Where such a large-scale undertaking is carried through so effectively as to embrace a dominating fraction of all the growers in a specialized producing region, or even conceivably co-extensive with the particular branch of agriculture, it verges upon "commodity control."

Control of the commodity is indeed one kind of efficiency in the securing of satisfactory prices. It has been visualized as one of the objectives of co-operative organization, and on the other hand has become an object of attack on the part of those who feared that co-operation as an agency for "big business" methods in agriculture was destined to lead to food monopoly and restraints upon agricultural trade. An examination of this issue will be a prominent feature of the remaining chapters of this book. In order to appreciate just what are the trends and potentialities in this direction, we must understand thoroughly not merely the structural details of co-operation, which have been discussed

[16] The state becomes the natural unit of organization for most federations and for centralized agencies whose work comprehends the shipping end of the business. However, selling agencies like the National Livestock Producers' Commission Associations draw their business from several states tributary to each particular market, and through the federation of these commission companies may in time achieve an essentially national livestock marketing organization. Similarly, the state wheat pools in Texas and Oklahoma maintained a common selling agency, and a similar arrangement was effected by five states in the Northwestern Wheat Growers' Association. In the South several separate state cotton growers' associations, merely by agreement, have created the American Cotton Growers' Exchange to perform selling as well as general service functions for the constituent state associations, and may eventually become the exclusive selling agency for all of them.

somewhat fully already, but must supplement this by an analysis of the practices characteristic of modern types of co-operation. Whatever degree of power in the market-place and influence over the price-making process co-operatives may acquire, it rests upon the authority to administer supplies which grows out of pooling provisions and of the control of product delegated under membership arrangements. The three chapters which follow will therefore examine the origin, growth, and present standing of these distinctive co-operative procedures.

CHAPTER VII

SEVERAL VARIETIES OF CO-OPERATIVE POOL

We turn now from a consideration of the distinctive *forms* which co-operative organizations take to an examination of the characteristic *methods* used by co-operatives in conducting their commercial enterprises. Co-operation means joint operation, the "mutual" handling of the business of many individuals acting as a group. It means the pooling of common interests. But the word "pool," though used freely among co-operatives, is used very loosely and with little discrimination of several rather diverse practices which it is from time to time made to cover.

In view of this confusing usage and since, furthermore, the word has acquired a somewhat discreditable meaning in the eyes of the law and in public opinion, we need to examine both the form and the purpose of pooling or joint operation methods from the simpler to the more complex as they have developed in the conduct of co-operative business. We shall discuss them under three heads: (1) The Expense Pool; (2) The Settlement Pool; and (3) The Market Adjustment or Manipulative Pool.

I. THE EXPENSE POOL

Co-operative business inevitably drifts into some type of pooling operations. The simplest of these may be nothing more than what is known in the ordinary commercial concern as "allocation of overhead." In other regards, however, they display pecularities distinctly their own. In preceding chapters we have skated over thin ice by describing co-operative business as "service *at cost*." This sort of generalization is all very well as covering the limitation of capital returns to going interest rates and the elimination of profits either to members or outsiders. However, "costs," while apparently a simple and easily understandable term in its common abstract usage, proves to be a very elusive quantity when its actual determination is sought in the practical routine of commercial operations. If it were possible for each individual's property to be handled separately in the process of co-operative business, it would be relatively easy, even though certain overhead expenses would have to be allocated under some more or less arbitrary rule. Obviously, however, the whole nature of co-operative business implies that individual parcels will not be separately handled, but that large volumes of product will be lumped together either for economy in handling or for greater effectiveness in bargaining for their sale. This leads to loss of identity of more and more of these service costs and to the

more thoroughgoing types of "expense pools."

Let us begin our discussion of this phase of pooling procedure with a simple type of co-operative business in which the member's belief and desire are expressed in the simple formula, "getting just what his product brings in the market less actual cost of getting it there." The livestock shipping association was at the start able to carry out such a theory with a close approach to accuracy. Animals were marked before shipment and sold according to this identification mark. They were then charged with their pro rata share of actual selling commission, yardage, freight, and home manager's expense. Any "shrink" in weight at the time of delivery as compared with weight at the local shipping point would be deducted pro rata on the theory that all had lost weight in the same proportion. This slight conventionalizing of charges, however, had to pass over to more open and conscious pooling in the case of losses due to deaths in transit or at the stockyards. Inasmuch as such a loss can be identified as falling actually upon the property of some individual shipper, the distribution pro rata over the whole load represents a clear departure from the practice of paying each man just what his stock actually brought. It is a very simple form of pooling, dictated by the obvious fact that the risk of such loss is common to all animals in the load.

Not only losses of weight, crippling, and death, but also the individual consumption of feed or

demands upon the time and attention of the manager and his helper, raise nice questions as to the actual cost of handling a given member's shipment and of the proper allocation of responsibility for these costs.[1] In practice it has been found expedient, if not necessary, to assume that all units handled in a given shipment are equally responsible for, and equally the beneficiaries of, the total expense incurred in handling that shipment. Thus even in livestock shipping associations the expense comes to be pooled for all individual lots making up a shipment [2] or constituting a particular class of stock in a shipment.

In the case of most commodities, moreover, the time of delivery and methods of storage, processing, and making up shipments do not permit of the cutting off of expense by separate parcels so clearly as in the case of livestock. Hence it becomes necessary to put more and more items of this sort from the direct to the overhead class, to pool handling expense over longer periods of time, and to deduct uniform handling charges from products coming from many different shipping points. To an extent, such freight charges have already been equalized

[1] See Iowa Agricultural Experiment Station, *Bulletin 209*.

[2] Still more intricate problems would arise in cases where more than one species of animals or different classes of other goods were included in the same car, thus necessitating the payment for the whole weight at a rate determined by the goods of higher classification. The same general issue is raised where storage or other facilities of a more expensive character must be provided for part of the goods handled, but used in common by all.

by the railroads under blanket or zone rates. In many others, however, even where a known difference exists, the cost involved in trying to reflect such differences in individual expense charges is found to be disproportionate to the benefit received by some or the loss incurred by others under a system of uniform charges by which all or certain classes of expense are pooled and distributed at a flat rate, possibly even to every unit of a product handled throughout a whole year.

The expense pool presents practically an accounting problem similar to that met by any business of considerable size and has, in so far as the writer is aware, raised no distinct legal issues. It is discussed here primarily for the purpose of giving continuity to our discussion of the whole process by which co-operative practice evolves from the simplest to the more complex situations which have raised legal difficulties.

II. THE SETTLEMENT POOL

We have pointed out that the desire of the co-operative "to get just what his product brings less actual cost of handling" is confronted by the difficulty of identifying clearly or estimating equitably the handling charges for separate units of a product which must be funded for purposes of economical and efficient handling. A little examination of the matter shows also that it is not less difficult, under such circumstances, to ascertain just what part

of the total receipts of a co-operative is properly to be credited to an individual member or to a particular parcel of goods handled.

We shall take a rather simple type of fruit or vegetable shipping association for purposes of illustration. Let us say that 100 farmers are delivering potatoes to a potato shipping association. To take the most simple possible condition, we will assume that today each of five producers delivers enough potatoes just to fill a single car, and that these five cars are this evening sent to market. It may be that the local manager has what he considers satisfactory bids for five cars and sells them all f.o.b. the local station, but gets for one or two of them a premium of a few cents a bushel over the price paid for the others. Immediately there arises the nice question of whose car shall get the preferential price. Or it may be that one or two cars can be sold on track at the local station and the others consigned to a terminal market. Or perhaps all of them command different prices, even though uniform in quality and sold in the same market. Still further, it might be possible that all five cars were consigned to different markets, in which they finally yielded perhaps widely different net prices to the shippers. To attempt to give the producer just what his product brought, when the choice of market to which it was sent or the particular buyer to whom it was sold was subject to the absolute decision of the local manager or the yet more arbitrary decision of pure chance,

would promptly engender such dissatisfaction as to break up the association.

The matter, however, is still further complicated by the fact that farmers deliver their potatoes in ungraded lots, whereas the market wants uniform cars; that for economical grading, storing, and loading, it is impracticable to attempt to maintain the identity of individual lots; and that the absorptive power of the market, the physical handling capacity of the warehouse, the ability to get cars, and the like may require the holding of some of the product for sale in later markets, sometimes at higher and sometimes at lower prices than those obtaining at the time of delivery. As a result, any but the very simplest co-operative selling operations preclude the identification of producers' lots clear through to the time when they are sold in the market, and necessitate some type of funding or pooling of proceeds as well as expense. Qualitative differences can, of course, be recognized under a system of grading, but time differences must be adjusted upon some basis related to the character of the product and necessary trade practices. Thus, for example, perishable fruits, which are shipped immediately upon delivery, and in whose market price changes are likely to be abrupt from day to day, are frequently handled on the basis of a one-day pool. Potatoes are in many ways suited to a weekly pool, although periods both longer and shorter than this have had some vogue. In the

case of oranges, pools of a month or six weeks in length at the beginning and close of the season, with a longer pool to cover the main crop, have seemed to give satisfaction. With more staple commodities, such as wheat, cotton, and tobacco, the all-season pool has much to recommend it.

In all that is here said, however, we must remember that we are considering pooling primarily as a method of settling for the product. Assuming that the time and place of marketing are determined by weather, perishability, transportation conditions, and similar factors entirely outside the co-operative association's hands, we note that it is to an extent impossible from the handling and accounting standpoint, but also inequitable from the economic standpoint, to attempt to earmark each grower's product and return the proceeds of this identical parcel to him. As in the case of the expense pool, we are dealing here with internal problems of the best possible management for the association and its members, and the question of public policy or legal sanction for such methods is hardly involved. However, this aspect of pooling shades off almost insensibly into a third class in which such legal issues are sharply raised.

III. THE MARKET-ADJUSTMENT OR MANIPULATIVE POOL

From the days of the Rochdale pioneers downward it has been pointed out that the competition of

a large number of small buyers or sellers with each other has been harmful to their best interests. The purpose of co-operation has been to supersede this destructive competition by some form of joint action which would be mutually beneficial. In non-agricultural fields large industrial consolidations have aimed to attain a size sufficient to assume the determination and handling of policies and operations of the steel industry, oil, meat-packing, electric equipment, or whatever, on a basis as broad as the industry itself. Similarly, farmers have desired to have a business agency competent to administer the affairs of the citrus fruit industry of California, the fluid milk industry of the New England states, the tobacco industry of the Burley district, the soft wheat industry of Indiana and Illinois, or the cotton industry of a group of Southern states, in economic units commensurate with the organization of the market in which their product is sold and the character and geographic distribution of the productive system by which it is produced.

Pools covering a wide geographical range and long time periods are characteristic of the "commodity marketing" movement. Pooling for local stations or small districts had been going on for many years before the new co-operative influence attracted attention. Likewise some organizations, and notably the California Fruit Growers' Exchange, had developed a system of pooling covering a period as long as several months or even the full season

on certain varieties of their product. This, however, was primarily a settlement pool, and involved little or no intention of putting the whole product in the hands of a central distributive agency to be administered in point of time in such a way as to produce the best price results. The semi-perishable character of the product precluded any great results in this direction, but with the development of centralized types of co-operation in products of a non-perishable character, such as beans, dried fruits, cotton, wheat, and tobacco, the idea of putting the whole season's supply under a single administrative control for the sake of securing better price results by a program of collective marketing gained considerable vogue.

The first formal expression of this type of pooling theory appears to be traceable to the influence of the American Society of Equity following 1902. Through it the philosophy that market control by manufacturers or dealers must be combated by strongly organized control of supplies on the part of producers gained a foothold in several parts of the Middle West. We have already noted that this led to the adoption in Minnesota in 1907 of amendments to the co-operative law, designed to permit joint selling by the producers of any commodity joined in an organization which might be state-wide in its scope and be made up by the federation of existing local marketing associations. The emphasis in this law was upon the structure of overhead

marketing agencies, with only incidental reference to the collective selling practices thereby involved. The collective selling provisions were simply added to the existing fabric of co-operative law.

Another prominent center of Equity activity was in the tobacco regions of Kentucky, and there too the pooling idea was taken up so vigorously as to result in its recognition in the law of the state. Kentucky had never developed local co-operative agencies to the extent which Minnesota had, nor had the legislature passed statutes providing for the organization of co-operative marketing associations. What was undertaken in 1906 was a holding movement designed to resist the depression of tobacco prices as a result of the concentration of demand in the hands of a small number of buyers practically dominated by a single "trust." [3] Such marketing activities in the way of assembling, storing, and selling as were to be undertaken were purely incidental to this primary purpose of controlling supplies in such a way as to attain a certain price objective. The Kentucky law therefore was not an enabling act providing for the organization and operation of a co-operative marketing machinery, but was a statute defining certain practices as being valid and legal within the state. The significant part of the statute of 1906 [4] read as follows:

[3] See Youngman, "The Tobacco Pools of Kentucky and Tennessee," *Journal of Political Economy*, January, 1910, p. 34; and Steen, *Co-operative Marketing*, p. 12.

[4] *Laws of Kentucky*, 1906, Chapter 117. This act and subse-

Section 1. It is hereby declared lawful for any number of persons to combine, unite, or pool, any or all of the crops of wheat, tobacco, corn, oats, hay, or other farm products raised by them, for the purpose of classifying, grading, storing, holding, selling, or disposing of same, either in parcels or as a whole, in order or for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crops separately or individually.

Section 2. That contracts or agreements made or entered into by persons with each other, the object or intent of which is to unite, pool, or combine all or any of the crops of tobacco, wheat, corn, oats, hay, or other farm products raised by such persons, for the purpose of classifying, grading, storing, holding, selling, or disposing of said crops or any of them, either in parts or as a whole, in order or for the purpose of obtaining a better or higher price therefor than could or might be obtained by selling said crops separately or individually, are hereby permitted and shall not, because of any such combination or purpose of said persons, be declared illegal or invalid.

Section 3. Such persons so entering into such agreement or contract as is set out in the foregoing sections are hereby permitted to select an agent or agents, through or by or with whom said parties so entering into such agreement may classify, grade, store, hold, sell, or dispose of said crops so placed in such agreement . . . for the purpose of accomplishing the object of such combination or agreement [etc.].

Although the tobacco pooling movement, after rather spectacular but temporary success, depending in considerable part on violence and "night riding,"

quent legislation amendatory thereto (see footnote 4, p. 203) were declared unconstitutional by the Supreme Court of the United States in International Harvester Company *v.* Kentucky, 234 U. S. 216 (1914).

practically disappeared in 1909, the general philosophy of collective bargaining was not entirely given up. In many sections of the country it was ready to come to open expression again as soon as the "commodity marketing" movement of the post-war period came forward to furnish it with an aggressive leadership.

IV. MARKET ADJUSTMENT AS A GOAL OF "COMMODITY MARKETING"

The objectives and methods of the recent wave of pool marketing can conveniently be set forth by quoting directly from its most vigorous exponent.[5]

> Co-operative marketing as such is concerned with one thing, and that is to do intelligent merchandising instead of dumping of a farm product . . . With all [the farmer's] intelligence in production, when it comes to actual selling or marketing of that product, he finds himself fairly helpless to have anything to say about the price of that product. And the old school says to him, "Supply and demand fixes that price, and you can't have anything to do with it." And the new school says to the farmer, "Supply and demand does not fix the price. There are two movable things in supply and demand, and those movable factors are supply where, and supply when—time and place are the two determining things which fix price value within supply and demand of any given product."
>
> . . . Now co-operative marketing sets out to control the flow of supply as to time, place, and quantity, and in order to do that it has to stop individual selling. That is the one big thing we have really learned in the last few years, that the aim of co-operative marketing is to

[5] Aaron Sapiro in an address at the Fifth Annual Meeting of the American Farm Bureau Federation, December 11, 1923.

merchandise in that way instead of dumping in the old method of individual selling . . . The farmer, as a merchandiser, must meet his group problem as a group. Marketing is always a group problem. You cannot market a single thing under the sun intelligently unless you know first what the other man is producing at that time, what he is moving into the market into which you want to sell, and what the absorbing power of all those markets might be. These things depend on the other fellow; therefore they are group problems, and cannot be solved by the individual farmer using his own discretion as to time and place and method or quantity of production or sales.

So the big thing we have found in co-operative marketing is, first, to clear up the purpose. Co-operative marketing is a system under which farmers, by proper organization, can learn to merchandise a commodity and control the flow of the supply as to time, place and quantity, and thereby have something to do with affecting the price value on that product. Co-operative marketing is not the making of cheese in a co-operative cheese factory. Co-operative marketing is a step which follows co-operative manufacturing. It is a step which follows co-operative packing or co-operative receiving, and it is not co-operative marketing unless the aim is distinctly the stopping of individual selling and dumping, and the substitution of merchandising, control of flow and supply, as to time and place and quantity.

This exposition, together with our own analysis of the market-adjustment type of pooling, must make it clear that there are likely to develop here two discernibly different situations as to price-making activity. When the individual producer or the local shipping organization renounces control over its product to a central administrative agency, such an agency naturally attempts to effect an intel-

ligent distribution of the whole product entrusted to its care. By building up a large-scale organization it can employ more expert servants, collect fuller information, and have a broader view of both the supply and the demand side of the market. This is likely to mean that it will not starve certain markets and glut others, but will itself perform an important equalizing or stabilizing function. If because of this broad view, expert personnel, and adequate warehousing and financing arrangements it is able to avoid distress selling at harvest time or during periods of acute weakness in the market, it has some possibilities of reducing the speculative element in distribution and possibly also of carrying unavoidable speculative risks at a minimum of expense. All these are simply elements of efficiency which in greater or less degree may be achieved through large-scale organization in any industry.

There is, however, here, as in other large-scale business organizations, the possibility that the mere size and weight of the centralized control might be used to dominate the market and to cause prices to take on a monopolistic character. No one has yet succeeded in determining just when a position of bargaining skill and significance as a factor in the market-place passes over to one of control in such degree as to deserve the title "monopolistic." It is clearly evident, however, that when a co-operative pool acquires the power and claims the right to withhold a product from market, either temporarily

or permanently, it begins to move out of the clearly lighted area of distributive efficiency into a twilight zone of market control in which public opinion is pretty sure to assert its right to examine, and possibly to restrict, market adjustment or manipulative activities. It is to be borne in mind, of course, that the perishable character of many farm products, and the fact that co-operatives have little or no control over the processes of production, make the danger here much less than in the case of so-called "natural monopolies," or even such manufacturing industries as permit of a high degree of consolidation in the ownership or operation of the productive plant.

Later chapters will develop in some detail the actual situation as to the market control practices of co-operatives and of the attitude of courts with reference thereto. It is our purpose here merely to show how the exigencies of co-operative business have called for several types of internal pooling arrangements, and the way in which such pools develop in the direction of practices at least superficially resembling market control or monopoly. It can hardly be denied that during certain aggressive campaigns for the organization of large co-operatives during the last few years the leaders themselves have lent color to the idea that they thought that the form of organization which they were developing with 50, 60, 75, or 90 per cent of the producing group tied to the association by a

long-time binding contract would give them power to exact a profitable price not so much through skill in distribution as through control of the supply situation.

This idea of co-operation as a means of exacting a cost-plus price has never been held by the better-trained leaders in the movement, and has gradually faded out of the minds of even the more radical under the disillusioning experiences of the last few years.[6] It is only natural, however, that honest believers in the efficacy of large-scale co-operative organization should, in trying to make the most convincing argument as to its value,[7] be tempted

[6] It is probably fortunate for the whole co-operative movement that when put to the test it has been found that, for the present at least, the degree of control which in practice could be acquired and maintained has been less than was at first assumed. It is to the credit of these leaders also that they have learned rapidly and fully the lessons of these illuminating experiences and are now interested in policies of economic handling and skilful distribution rather than in programs of market control.

[7] "Our association sells prunes. Last July we made our so-called opening price on prunes. There was a meeting there and fifteen people present; thirteen of them were directors of the association, and two others were a stenographer and myself. I just sort of butted in because I like to be there when they do exciting things. They were met to fix the price of prunes. Did you notice what I said? I didn't say they were together to accept the price which the Chicago Board of Trade or anybody else in the world put on prunes. They were met there to fix the price of prunes. They knew they could do it, because they had absolute contracts covering the better part, by far the greater part, of the prune crop of the United States. Mr. Coykendall, the General Manager, who is unquestionably the ablest man on co-operative marketing in the United States, slapped down on the table a great batch of contracts, and said: 'These are contracts between the California Prune and Apricot Growers and various wholesalers and buyers of prunes throughout the United States. These contracts are all signed. They cover 110,000,000 pounds of prunes. The price is not there.

rather to overstress the coercive power of centralized control. An interesting handling of this difficulty comes from the National Pecan Growers' Exchange:

Some of the advantages offered by co-operative marketing may be summarized as follows:

1. Centralized Control. A million pounds of nuts offered through one hand will bring good prices and stabilize the market; but a million pounds offered from many different sources and indiscriminately dumped in a few of the principal centers will break the market into smithereens.

2. Standardization, which means curing, grading, classifying and packing to a standard so that dealers will place absolute reliance in the grade and brand.

3. Stabilization of the Market, which means that dealers will have confidence to buy without fear that on the morrow prices will be broken.

4. Distribution, which means opening up new markets and conserving old ones. When a product is confined to a few markets congestion results and prices become demoralized as production increases. When each grower sells for himself some markets will be flooded and others bare; but when marketing is centralized in our co-operative Exchange, the crops, no matter how large, can be distributed with systematic precision and an even balance maintained.

5. Growers Fix Prices under co-operative marketing; otherwise independents and speculators fix the prices. Growers, do you recognize the value of this to you? Think it over.

These contracts are all firm at our opening price, whatever price this association makes.' Did you growers or any of you ever in your lives hear of a condition where you could make contracts with buyers of your products, a signed, good contract firm at any price you choose to fill in on it? Any man ever chance to hear of such a thing? That is how we sold our prunes." Sapiro, Aaron, "Co-operative Marketing," American Farm Bureau Federation, *Bulletin No. 4.*

6. Elimination of Speculation, which means that the speculators' net profits will be distributed to the growers as extra profit. It is a fact that elimination of the middleman's profit, under co-operative marketing, not only raises the price to the grower but actually tends to reduce it to the consumer. Before the almond growers were organized the average return to the grower was about 6 cents per pound for Nonpareil; but since they organized the average return for Nonpareil has been 17 cents and more per pound and yet the price to the consumer was not raised. This result was brought about by elimination of speculation and wider distribution of almonds.[8]

Recent leadership has shown a commendable tendency to warn against the more extreme views of market control. The Secretary of the National Council of Farmers' Co-operative Marketing Associations recently spoke as follows:

I do not like to put myself in a negative attitude towards anything, much less towards co-operation. . . . The time has come, however, for those in positions of responsibility in the co-operative movement to face the fact that some members of co-operatives have many false notions about what their associations can and should do. These fallacies must be boldly attacked and uprooted if we are to have the unity of aim and purpose and the loyal support of our membership necessary to make the movement efficient and successful. . . .

1. A co-operative cannot monopolize supply and arbitrarily fix high prices. In the first place, no co-operative can monopolize the supply of any farm product. In the second place, if it did obtain monopoly control and forced prices "out of line," it would destroy itself and bring loss and disaster to its members. The

[8] Wm. P. Bullard, President-Manager, in leaflet issued by the Exchange.

immediate result of monopoly prices of farm products would be decreased consumption and increased production. The holdings of the co-operative (held off the market to drive prices up) would have to be sold sometime to pay members and when that was done prices would drop. In the meantime larger crops, stimulated by high prices, would be coming to harvest and the co-operative would be swamped. . . .

The utmost that a farmer's co-operative can do, or should try to do, is by intelligent merchandising to secure for its members the highest prices which a fair consideration of supply and demand and general business conditions will justify. By control of a sufficient volume of production, a co-operative may eliminate wastes and costs of distribution, may shorten the route to market, and by preventing temporary and seasonal gluts and congestion may bring about fairer and more equitable basic price levels . . .

3. A co-operative cannot sell at prices which will equal cost of production plus a profit to all its members. Certainly it cannot do that until all members become highly skilled and economic producers, and are able to prevent crop loss and damage of all kind. Commodities must be pooled and sold in the market at the best prices obtainable. Special prices cannot be obtained for members who practice expensive methods of farming or who lose a part of their crops through weather damage or the ravages of insects or plant diseases.

4. Co-operatives cannot sell bumper crops for as high unit prices as small crops. Larger crops mean lower prices, and when farmers produce an over-supply their co-operatives cannot prevent prices going lower. They may extend markets, find new uses, convert lower grades and culls into useful by-products and in many other ways aid in price maintenance, but heavy production is certain to bring lower prices. . . .

5. A co-operative cannot make its pool prices higher than occasional sales by non-members. One of the aims of a co-operative is to substitute merchandising for

dumping. Merchandising means, for one thing, orderly selling throughout the period of consumption. Every market has its high points and its low points during a season. A co-operative moves its supply to market in an orderly manner, guided by the judgment of skilled salesmen well supplied with market information. Each member receives an average or pool price for the pooling period, which is never as high as the highest price of the season and never as low as the lowest price. . . .

But the main reason why such a comparison is unfair is because it is not the aim of a co-operative merely to get higher prices for its members than outsiders receive, but to make a good market upon which all may sell. THE REAL TEST IS: WHAT WOULD THE PRICE TO FARMERS HAVE BEEN HAD THE CO-OPERATIVES NOT BEEN IN THE FIELD? . . .

9. A co-operative with only a small percentage of the total supply cannot be a dominant market factor. So long as an overwhelming majority of producers of a particular crop stay outside of the co-operative and give aid and comfort to the speculative system, no one has a right to taunt the co-operative with its failure to accomplish price stabilization. There is a fruitful field for a properly organized co-operative handling only a small percentage of the crop, but it should not be held responsible for the continuance of the speculative system and the evil of low and fluctuating prices. Give the co-op a chance to be a market factor before you hold it responsible for market conditions.[9]

Of course opinions still differ within the ranks of the co-operatives themselves as to policies or tactics to be followed either in general or in particular instances. It is only to be expected also that opinion on these matters will continue to change in the future as new individuals come into the movement

[9] Peteet, Walton, *The Wheat Grower*, October 1, 1925.

or as new situations develop. Hence, while pooling as a commercial practice may be regarded as well established, the precise uses to which the method may be put from time to time will continue to raise questions for both co-operators and courts to wrestle with. (See Chapters X, XIV, and XV.)

Obviously the significance of the pooling method of conducting business will depend largely upon the degree of control over the product which may be acquired by any co-operative association. This in turn depends upon the character, duration, and enforceability of the contract relations between an association and its individual members. We shall need, therefore, in the following chapter to examine the origin, growth, and present status of membership rules and contracts as a feature of the structure and management of present-day co-operative associations.

CHAPTER VIII

THE EVOLUTION OF THE MEMBER'S CONTRACT

At many points our discussion has stressed as the distinctive feature of co-operative organization the fact that it brings together a group of persons engaged in a common undertaking to set up a mutual agency for the performance of one or more of the functions needful to their business on the basis of service at cost. Whereas the ordinary profit-seeking corporation goes into the open market to attract patrons and secure patronage on a competitive basis, co-operation aims to eliminate the costs of such competitive sales promotion or other methods of business development by bringing together in advance a suitable volume of business which shall, without further cost, be somewhat permanently organized for economical and efficient handling by the common service agency.

This permanent and non-competitive mobilization of a profitable volume of business is incidental to the fundamental structure characteristic of the co-operative *association*. That is, the co-operative is made up by simply coalescing the individual bits of business of *participating members* for group marketing, processing, production, financing, or whatever. As

a feature of this distinctive organization, therefore, it is important that the responsibilities and commercial obligations of such a participating member to the group agency, as well as his rights to use it and share in its benefits, shall be clearly set forth as a part of its fundamental structure.

In reviewing the several steps by which more adequate enabling acts have been put upon our statute books, we have had occasion already to refer to the fact that the member's contract has come to be accepted by legislatures as a desirable and proper means of achieving this end. It is important however, not merely that we should observe such general provisions of present-day statutes, but also that we should examine in detail the precise forms of contract which are being drawn under the authorization of such statutes, and the attitude which has been taken by the courts with reference to the terms of these contracts, and the legal measures which may be employed in their enforcement. Examination of the development of case law on these points will be reserved until later in the book. In the present chapter and the one which follows, we shall examine not merely the characteristics of members' contracts which are in vogue at the present time and of measures designed to secure their enforcement, but shall precede this by a historical analysis of earlier and simpler efforts toward defining and securing the member's support of his co-operative agency.

I. THE "MAINTENANCE CLAUSE"

The economic theory underlying co-operation envisages the introduction of economies and the increase in efficiency of operation as a result of the positive and personal effort made by the member in behalf of his mutual organization—a collaboration such as is lacking in the case of ordinary competitive business. Against this engaging ideal, however, stands the practical fact that a perennial weakness among co-operative enterprises by and large has been their inability to secure this consistent and whole-hearted support on the part of their membership.

Co-operatives therefore early found it essential to introduce into their forms of organization a definite discipline designed to strengthen and preserve the initial interest and loyalty of their members. Far back in their history, local co-operatives began to meet this need by adopting a by-law providing that any member who disposed of his product outside his association should reimburse the co-operative by some stipulated amount for each unit of product so delivered. Such a provision was referred to as the "maintenance clause" or, particularly by outsiders, as the "penalty clause." The purpose and theory of such a provision may be briefly explained.

If a co-operative association is to engage in commercial undertakings and put itself in a position to serve its members effectively it must hire em-

ployees, build or lease property, purchase equipment, arrange financing, or make other forward commitments characteristic of any well-managed business. All such planning must be based upon some reasonably predictable volume of business. If, after such commitments have been made, the expected volume fails to materialize, expenses will be unnecessarily high, the reasonably expected benefits will fail to appear, and frequently the whole enterprise will be involved in economic failure and, quite possibly, financial loss to the members.

Co-operatives aim to "travel light" and thus to out-distance their more ponderous rivals. But this means that, in case of attack, they are in a comparatively weak defensive position. By contrast, the capitalistic corporation starts out with somewhat large accumulations of capital, and these are rather characteristically augmented in the course of successful business. This is calculated to put the corporation in a position to withstand competitive attacks even of the cut-throat variety. In scaling down such commercial defenses, co-operatives are thrown back for their success and even safety upon a reliance in the loyalty of the members and their continuance stoutly in the support of the co-operative enterprise in the face of any effort to hamper its operations or to impair its volume of business.

Farmers have been notorious for being alert to dispose of any bit of product they may have ready for market at the place and in the manner where

they can get the highest immediate return for it. They are accused out of their own mouths of "shopping for the odd nickel" rather than adopting a consistent policy of supporting long-time plans or permanent agencies for the fundamental improvement of their marketing conditions. This, of course, is a generalization which applies to many individuals at particular times and places rather than to all farmers everywhere. The unquestioned success of numerous co-operative enterprises demonstrates this. However, private dealers whose business was curtailed or threatened with destruction by the coming of co-operative undertakings have not been slow to use their knowledge of farmers' psychology to attack the co-operatives at a highly vulnerable point by bidding a little more than the co-operative felt itself in a position to pay and frequently more than the private dealer himself could pay an make a profit. Obviously, however, such a dealer could afford to accept actual losses for a time if by so doing he could prevent his co-operative rival from fulfilling its obligation to buyers, or could greatly increase its unit cost by reducing the volume of business handled, or could alienate membership permanently or for a time long enough to force the co-operative to the wall.

Such tactics have been successful in many cases, but have naturally led to the devising of defensive arrangements on the part of co-operatives. The first successful instance seems to have occurred as early

as 1889 in the case of the Rockwell (Iowa) Farmers' Elevator.[1] Farmer grain companies of that day came into being primarily because line elevator companies with a monopoly of the market at many local stations were quoting prices disproportionately low compared with those at terminal markets. A line elevator company, however, was in a peculiarly favorable position to retaliate by out-bidding any farmers' elevator which tried to compete with it at a particular point. It could readily raise its quotation in that particular town and absorb any local losses into the profits made over the whole system, or even gain it back subsequently at the same station by proportionately lower prices after the farmers' company had been broken up.

Certain shrewd observers of this situation reasoned that all the farmer needed was a local outlet to the terminal market, where prices were at the very least much more equitably adjusted by the forces of competition than they were in the tightly controlled local market. In order, therefore, to give the necessary financial support to the local agency even when more profitable prices were being offered outside, they devised a by-law provision requiring all members to pay a fixed charge to their own company for every bushel of grain marketed, whether through this co-operative elevator or otherwise. The amount was ordinarily the same or slightly less

[1] Compare Nourse, E. G., "Fifty Years of Farmers' Elevators in Iowa," Iowa Experiment Station, *Bulletin No. 211*, p. 244.

on grain sold outside than the handling charge upon grain actually shipped through the elevator.

This payment was in the nature of an assessment upon each member for the maintenance of a selling agency designed to give him a free and open local market. It was most equitable that this charge should be made uniformly upon all products of a given kind which each member marketed. If he sold through the association the charge was deducted from his proceeds. If, however, he elected to sell outside the association, it devolved upon him to come to the local manager with a contribution of like amount. In case he failed to do so, the association would undertake to collect this sum from him for the support of the mutually-established selling agency. The idea was not that it was a penalty upon the member for selling outside, for he was entirely free to do so if he saw fit, and indeed was often urged to do so if he could get a larger return for his product.

The maintenance fee provided, on the one hand, that the farmers' own selling agency should be maintained constantly available to furnish him a local market. At the same time it discouraged the practice of overbidding by competitors who were desirous of putting the co-operative association out of business. Under the operation of the "maintenance clause" such an overquoting buyer would soon find himself "hoist with his own petard." The more patronage he attracted the greater would be his

losses, while at the same time the excess payment made to the producer would go wholly or in part into the treasury of the co-operative, thus maintaining a producer shipping agency which would be prepared to pay up to the full market value at any subsequent time when the private dealer might seek to depress the price.[2]

The whole principle of the "maintenance clause" was thrashed out in Iowa in the days of the elevator fight about 1904.[3] This was fully 15 years after the introduction of the "maintenance clause" in the by-laws of the now famous Rockwell Elevator. At that time the state grain dealers' association set up

[2] "The only thing that saved us when everything else was gone was the one cent protection clause." Hathaway, B., *American Co-operative Journal,* March, 1908, p. 78.

[3] "The penalty clause which has been so viciously attacked by the grain combine and their agents, is absolutely necessary to the existence of the co-operative grain companies. The day of independent individualism in honorable and open competition is passed, and the struggle is now between a corporate few and a co-operative many. We shall be able to show by competent witnesses that the independent dealer in grain, no matter how honorable or how honest, has gradually but certainly been forced to surrender to the privilege-fed monopoly, known as the line house elevator companies, and has, as a general rule, been forced into this combination or out of business. The combine, after controlling the grain business both in country and terminal markets for several years, have met their first obstacle in the penalty clause. As a representative of the Farmers' Association in Iowa and of every grain grower in Iowa, I am here to defend that clause as being good in both law and morals.

"The penalty clause is so far removed from being unfair, unjust, un-American, that in reality it guarantees, not only to the stockholders who are responsible, but to every grain grower within reach, a free and open market. In the payment of this assessment the stockholders simply take the wise precaution of guaranteeing the perpetuation of these conditions." *Senate Document 278,* 59th Congress, 2nd Session, p. 651.

the claim that the payment of a service or maintenance charge by members meant the defraying of operating expenses from an assessment, and thus put the farmers' elevator having such a by-law in a position of unfair competition with non-co-operative companies. Commissioner Lane of the Interstate Commerce Commission, who was conducting the hearings, found no merit in this contention, and shortly thereafter Mr. H. W. Byers, then Attorney General for the state of Iowa, gave an opinion favorable to such a by-law. This opinion was widely quoted and did much to strengthen the position of the advocates of the "maintenance clause." The practice of adopting such a by-law was spreading in other nearby states in which the farmers' elevator movement was growing.

The phraseology of the "maintenance clause" is worth examining for the light which it sheds on the real purpose and thought of those by whom it was developed. For this purpose, the statement promulgated by the state Farmer Grain Dealer Associations through their official organ [4] is presented below:

> The following will be found by co-operative companies a safe, reliable and effective amendment to their by-laws, wherever they wish to adopt the protection clause. This article has been drawn up by one of the best attorneys in the United States, and recommended by him as being entirely within the law and effective at the same time. We are therefore in a position to recommend its

[4] *American Co-operative Journal,* Vol. II, p. 14.

use by any old company who wishes to amend their by-laws by adopting the PROTECTION CLAUSE, or for the use of new companies in protecting their business from the start.

The term "PROTECTION CLAUSE" is important; use no other term in adopting this plan.

Be it

RESOLVED by the Stockholders of..... that

"WHEREAS said.....is a corporation organized in part for the mutual benefit of the stockholders thereof, and

"WHEREAS, the welfare and success of said..... depends largely upon the patronage of its stockholders, therefore be it

"RESOLVED, that Article.....of the by-laws of said.....be amended by adding thereto a section to be known as Section..... in the words and figures following, to-wit:—.....

Every stockholder of this company, except as hereinafter provided, shall sell all of the grain which he markets to this company unless this company refuses to purchase the same at a fair and reasonable price in the city of .....in the State of..... after a reasonable request so to do made by said stockholders.

Provided, however, that if any stockholder shall reside, or his grain be raised.....miles or more nearer a market other than.....and he hauls to, and sells his grain at, such other market, he shall be exempt from the foregoing provision.

Any stockholder of this company who shall violate the foregoing provision first above mentioned, shall, within thirty days of the delivery of said grain, pay to this company, as and for liquidated damages due to this company for such violation, and not as a penalty, the sum of.....per bushel of grain so sold in violation of said provision.

The amount or amounts for which any stockholder becomes indebted to this company on account of any violation or violations of any provision or provisions of this by-law, shall immediately become and constitute a lien upon and against the stock of any stockholder guilty of a violation of this by-law, also upon and against any sum or sums due to become due to said stockholder from this company.

This general type of by-law has been employed quite widely not only by farmers' elevators but by horticultural associations. For example, the Eastern Shore of Virginia Produce Exchange adopted a by-law in the following form:

All members shall be required to market their farm produce exclusively through the exchange—provided, however, that in case any member is offered a price plainly in excess of the market value of goods, for the obvious purpose of inducing him to break off his relationship with the exchange, then the general manager shall have authority to direct him to accept such offer without loss of membership rights.

In this association violation of the above rule would result in expulsion of the member, but he might be reinstated upon his agreement to live up to this requirement in the future.

The United States Department of Agriculture, when it entered this field of discussion at a relatively recent date (1920), took the position that, while the "maintenance clause" had in the early farmers' elevator movement provided an equitable means for contributing to the support of the co-op-

erative company during an emergency, its real purpose had later been lost sight of and it had been used as a coercive means to compel patronage. They therefore advised the abandonment of the "maintenance clause," adding:

> In case it becomes necessary to meet conditions brought about by other dealers paying more for grain than it actually is worth in order to discredit the co-operative company, a direct personal appeal to the members, stating frankly existing conditions and probable conditions in the absence of the co-operative company, would seem to be a better method. This might be followed by an attempt to protect and maintain the company in operation by means of a special contract arrangement.[5]

In the same volume, therefore, there was presented a form for a "service and maintenance agreement" which would be distinctly bi-lateral in character and provide for a flat charge per bushel for a general and permanent market service made available to the patron by the elevator organization. (For full text see Appendix G.)

Before passing on to show how the by-law provision for a maintenance fee has been quite generally superseded by the crop contract binding the member to exclusive dealing through the association, it should be noted that even the maintenance fee was attacked as being a penalty and operating in restraint of trade. In later chapters the issues

[5] "The Organization of Co-operative Grain Elevator Companies," U. S. Department of Agriculture, *Bulletin No. 860*, pp. 29-30.

involved in this matter and the positions taken by various courts with reference to it will be carefully examined. Here, however, we are concerned simply in getting an understanding of what these several devices were [6] and how they came to be developed in the practices of co-operatives.

II. MEMBERSHIP CONTRACTS AND EXCLUSIVE DEALING

To attempt to ascertain just when the first use was made of separate formal contracts between members of a co-operative association and their common marketing agency would involve great labor and have slight practical value. We read, however, that the Pachappa Orange Growers' Association,[7] formed near Riverside, "was the first

[6] A situation somewhat different from that outlined above is to be found in the history of an early horticultural association. In 1886 the Chautauqua Grape Growers' Shipping Association sought to assure the exclusive patronage of all its members by cutting off any who shipped outside the association from participation in its financial benefits. "The main revenue of the association came from rebates which it received from the railroads, and so, as a penalty, it was provided that any grower who failed to ship all his grapes through the association should thereby forfeit his share in this rebate fund, as it was called." Phillips, H. D., "Co-operative Marketing in the Chautauqua-Erie Grape Industry," Cornell University Agricultural Experiment Station, *Memoir No. 28,* September, 1919.

[7] "This pioneer group of growers operated in the late eighties, consisting of eleven neighbors and friends who banded themselves together and agreed to sell their fruit in a pool. In 1892 formal incorporation was effected under the Benevolent Corporation Act of California, i.e., without capital stock. For the first two years the output was sold to a fruit packer, thereafter being packed under contract, as a packing house was conveniently located with respect to the orchards represented, and it was not until 1895 that the Pachappa Orange Growers Association deemed

strictly co-operative [citrus growers'] organization" and that during the spring of 1893 it put in operation a growers' contract in the following terms:

We, the undersigned orange growers of Riverside, California, hereby agree to deliver the entire crop of oranges now growing in our respective orchards at the packing house of F. B. Devine in the said City of Riverside, there to be weighed, culled, graded, packed, sold, shipped or otherwise disposed of under the management and supervision of the Pachappa Orange Growers' Association—a Corporation organized and doing business under the law of the State of California—upon a community basis jointly with the oranges delivered in like manner by the members of said Association from their own orchards and in accordance with the terms and conditions of a contract made and entered into by and between the said Corporation and the said F. B. Devine and bearing date ....., which we have read and approved and a copy of which is hereto attached.

We also agree to pay our proportion of the general expenses incurred by the said Corporation in handling and disposing of the fruit of the undersigned in connection and jointly with the fruit from the orchards of the members of said Corporation upon a community basis as above stated. We further agree that any or either of the orchards of the undersigned may at any time for cause detrimental to the whole be excluded from participation in the handling of said fruit upon the community basis, as provided, by a two-thirds vote of the membership of said Corporation. The said Corporation agrees that the undersigned shall fully participate in the shipment of their fruit upon the community basis as aforesaid, in the manner herein described and as set forth in the contract with the said F. B. Devine, and that they

it expedient to secure a packing house and pack its own fruit." MacCurdy, R. M., *The History of the California Fruit Growers' Exchange,* p. 16.

shall receive their pro rata share of the net proceeds of the fruit so shipped according to varieties delivered and in the manner prescribed for the distribution of the same.

In employing a contract between the association and its members these people were simply carrying over into a co-operative undertaking what was already the established practice of commercial concerns handling fruit. Private packing houses had been in the habit of signing up growers on contracts just as sugar beet factories, canning and pickling companies, and seed houses still do in many parts of the country. The contract quoted is noteworthy in that it makes no special provision for liquidated damages or other remedies for breach of the contract or methods of securing its performance. The contracts with the private packers provided "first, that the fruit would be delivered at such time as the handler might want it; second, that if the fruit was not so delivered, the handler had the right to pick, pack, and market the fruit at the grower's expense, for which he was to receive ten per cent on all costs incurred, 50 cents a box for packing and 10 per cent commission on gross returns; and, third, that if any loss was sustained, the grower was obligated to reimburse the commission firm." [8] This indicates that the growers had before them an example which might well have been used as a precedent for including some sort of damage clause in their own contract. Possibly their resentment of

[8] *ibid.*, p. 22.

such measures on the part of private handlers gave them a distaste for including anything of the sort in their own arrangements with members. At all events they soon found it necessary to do something to put teeth in the contract. "The grower, finding as his enthusiasm slackened that the new system was not a panacea for all marketing ills, at times changed his marketing plans. Indeed, as early as January, 1894, a problem not entirely uncommon throughout later years was encountered. 'The Riverside Fruit Exchange has obtained an order of court restraining ..... from selling his organges to outside parties,—he having contracted to sell them through the Exchange.' " [9]

Gradually, however, these associations strengthened their contract by the introduction of a clause providing for liquidated damages in the event that fruit was delivered outside the association. In a great many cases a very simple type of contract continued to be used and it kept strictly to the practice of making the association merely the selling agent of the growers, that is, the product remaining the property of the grower until finally disposed of in the market. Such a contract [10] appears below:

We, the undersigned, growers of citrus fruits, being desirous of having our fruit handled in a manner substantially as set forth in the above by-laws, do, for such purpose, hereby severally constitute and appoint the..... ....., California, a Corporation organized

[9] *ibid.*, p. 32.
[10] See Cumberland, William W., *Co-operative Marketing*, p. 67.

under the laws of the State of California, our sole agent to pack and sell all citrus fruits which may be grown on our respective orchards during the entire period of membership in said Corporation. We and each of us do further agree that all expenses incurred by said Corporation in handling and marketing said fruits shall be paid out of the proceeds of the sale of said fruit pro rata, according to the amount of fruit furnished by each of us respectively, and we and each of us agree to accept for the crop our pro rata share of the net proceeds of the sale of fruit furnished by us, after deducting the cost of packing, selling, and other necessary expenses. Nothing herein contained shall be construed to interfere with bona fide sales of orchard property. Any and each of us who will otherwise dispose of the merchantable fruit grown on the property hereby contracted, during the period of this contract, shall pay to the Corporation the sum of twenty-five (25) cents for each and every packed box of commercial weight so sold, marketed, or consigned, as liquidated damages, as provided in the foregoing by-laws, which are hereby made a part of this contract.

With the continued use of member contracts, however, there was a tendency to give them a more detailed and specific form and also, except in the case of perishable products, a growing desire or need on the part of the association to have title passed to it at the time of delivery of the product in order that processing, storage (and the issue of warehouse receipts), and financing could be administered most effectively. These tendencies are evident in the so-called "uniform crop agreement" developed by the California Fruit Growers' Exchange [11] and by it recommended to the local packing house associa-

[11] See Powell, G. Harold, *Co-operation and Agriculture*, 1913, p. 33

tions. This contract [12] provided that "each of the second parties hereby sells and conveys, and agrees to pick, haul, and deliver to the first party ..... for the purpose of packing, selling, and marketing, all the citrus fruits now growing upon his land, [etc.]. The first party agrees to receive, pack, sell, and market all of said fruit whenever a market may be found for the same, which, in the judgment of the first party ..... shall justify such selling and shipment. The first party agrees to pay to each of the second parties the amount received for his said fruit, less its regular charges for packing, shipping, selling, and marketing the same."

Since the marketing specialists of the Department of Agriculture who worked on the Department bill already discussed were concerned primarily with perishable products, it is perhaps not strange that the only sort of relationship between producer and co-operative association which they set forth was the agency relationship. And even as late as April, 1922, when the Department offered a "Standard Form of Crop Contract," [13] no reference was made to the fact that various co-operative associations dealing in semi-perishable or non-perishable prod-

[12] For full text see Appendix F.

[13] The full text of this Department contract form is presented in Appendix E. It will be noted that particular attention was given in this contract to showing clearly the bi-lateral nature of the agreement and the considerations on both sides. The wording is as follows:

"That for and in consideration of the expenses to be incurred by the Association in providing means and facilities for handling, storing, and marketing (Fruits and Vegetables), including the ex-

ucts had found the sale and resale type of contract serviceable and had made substantial progress toward perfecting its form.

This movement had progressed through several stages in the experience of the California co-operatives, beginning probably with the Lima Bean Growers' Association organized in 1909.[14] In order to facilitate both pool handling and the securing of credit through the association, their contract, as drawn in 1912, authorized the association "to act . . . for them and each of them [the growers] in its own name and in all respects as though said beans were in fact owned by it, treating all of said beans of the same quality as if commingled, and actually commingling them if such actual commingling shall be deemed . . . necessary or convenient." To this end, the contract included an

pense of locating, organizing, and establishing markets, and in further consideration of the mutual obligations and promises of the respective parties hereto, it is hereby agreed as follows:

"1. That the Grower appoints said Association his agent, and the Association hereby agrees to act as such for the purpose of handling, packing, storing, and marketing all the (Fruits and Vegetables) which shall be grown for shipment and sale by the Grower or for him, whether as landlord or tenant, or otherwise, upon that certain tract of land . . ."

[14] It may be noticed in passing that the bean growers made an arrangement whereby 25 per cent of the proceeds received from the sale of beans might be used for the purchase of non-members' product to be thrown into the pool—a procedure which was abandoned after a comparatively short time. Without particular reference to this or any other terms of the contract of 1912, representatives of the office of the Attorney General of the United States took the position that the bean growers' association was illegal as to any of its pooling operations except as they might be shown to be reasonably necessary as a means of combating combinations formed against them by brokers.

assignment of title in the following terms: "The growers for the purpose of carrying out the terms and provisions of this agreement do hereby transfer and assign their said beans to the Association, together with any warehouse receipts to be hereafter issued therefor." [15]

The raisin growers of the Fresno district were likewise developing a centralized type of association, and carefully studied the experience of the lima bean growers. Several of the general features of the bean contract are therefore to be found in the raisin growers' contract of 1918,[16] which is of the fully developed sale and resale type. This contract refers to the parties merely as the buyer and the seller, and its significant clauses run as follows:

> That the Buyer does hereby purchase, and the Seller does hereby sell, all of the crops of.....raisins to be produced during the years, 1918, 1919, and 1920 on the following described land in.....at and for the following minimum prices net to the Seller . . .
>
> 3½ cents per pound for first crop of Muscats;
> 3 cents per pound for second crop Muscats;
> 3½ cents per pound for Sultanas
>
> . . .

[15] However, it appears that the roots of this idea of conveying title run back practically to the beginning of California co-operative practice. This is shown by the fact that "the earliest contract in the Exchange system, approved May 5, 1893, by the directors of the Riverside Fruit Exchange," opened with the declaration: "We . . . hereby severally constitute and appoint the Riverside Fruit Exchange our sole agent and convey to said corporation the entire crop of oranges that may be grown upon our respective ranches for the season 1893-94." (MacCurdy, R. M., *The History of the California Fruit Growers' Exchange*, p. 19.)

[16] For full text see Appendix H.

This instrument is intended by the parties to pass to and vest in the Buyer a present title to all of the crops of raisins covered hereby, and to give to the Buyer the right to the possession of said raisins when and as they are placed in sweat boxes. . . .

For the consideration herein expressed, in addition to the prices hereinabove agreed to be paid, the Buyer agrees to use its best efforts to re-sell said raisins at prices higher than the minimum prices so paid, and if it shall obtain such higher prices it will pay the excess over to the Sellers named in this and similar contracts, according to the quantities and varieties of raisins received from the respective Sellers, first deducting, to be retained for itself, the sum of one-fourth of one cent per pound for all raisins received under such contracts, and also each Seller's pro rata share of all expenses of the Buyer incurred in its operations during the twelve months next preceding October 1st in each year. . . .

It has been thought necessary, or at least highly desirable, to embody this same sort of relationship in the newer "commodity marketing" contracts used in connection with cotton, tobacco, and other non-perishable products during the last few years. Experience seems to show that such a contract is favorably regarded by the bankers and business men with whom the co-operative association must do business.

A good deal of doubt exists, however, as to whether, in a strictly legal sense, such an arrangement is anything other than an agency in which, for purposes of convenience and effective handling of the business, the agent is given definite rights to the disposal of the owner's product.[17] In the case of

[17] Mr. Gerard C. Henderson in 23 Columbia Law Rev. 91 examines in detail (p. 100ff.) "what is the nature of the title or

a recent Pennsylvania association (the Pennsylvania Tobacco Growers' Co-operative Association) a contract was drawn which it was thought would meet all the needs for effective financing, storing, and selling of the product, but still on an agency basis, as required by the co-operative law of the state, which is virtually the Department bill of 1917.[18] By the exercise of sufficient care in drawing the contracts, the necessary control and flexibility in operations can be secured even under the agency type of contract. On the other hand, it may well be argued that if the legislature of a state sees fit to pass a law in the general form of the Kentucky

possessory right by which an association holds property which is marketed for its members . . . and to what extent it acts in a fiduciary capacity." His conclusions are challenged by Professor H. W. Ballantine in 8 Minn. Law Rev. 1 (at p. 15). See also Tobriner, M. O., 12 Am. Bar Ass'n. Jour. 23.

[18] The clause in question reads as follows: "9. The Grower agrees that the Association shall borrow money on the tobacco through drafts, acceptances, notes or otherwise, or on any warehouse receipts or bills of lading, or upon any accounts for the sale of tobacco, or on any commercial paper delivered therefor, and further agrees that in connection with any such loan the Association may pledge the tobacco, assign and deliver warehouse receipts or bills of lading, transfer fire insurance policies and accounts due the Association, as well as any other collateral, and authorize the lender to make public or private sale, with or without notice, of any such collateral in the event of default, and may make any other provisions customary in such agreements or adapted to the security of the lender; and for the purposes herein set forth, there shall be vested in the Association the legal title to, and the right of possession of, all tobacco delivered by the growers under this and all other similar contracts. The Association shall apply the proceeds of any such loans either to meet its expenses or to make advances to its members, as may be deemed advisable by its directors."

Act of 1922,[19] they thereby define the transaction between the member and his association as a sale. In a recent case [20] the Louisiana Supreme Court has taken the position that where the legislature has seen fit by statute to provide for a special form of sales contract the courts are bound to recognize such transactions as in fact valid sales, even though they may not conform to common law principles covering sales contracts.

Contracts of this form are particularly adapted to seasonal pooling and indeed are practically neces-

[19] This section of the law reads as follows: "If [the members] contract a sale to the association, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded liens, to the association upon delivery; or at any other specified time if expressly and definitely agreed in the said contract. The contract may provide that the association may sell or resell the products delivered by its members, with or without taking title thereto; and pay over to its members the resale price, after deducting all necessary selling, overhead and other costs and expenses, including interest on preferred stock, not exceeding eight (8) per cent per annum, and reserves for retiring the stock, if any; and other proper reserves; and interest not exceeding eight (8) per cent per annum upon common stock."

[20] Louisiana Farm Bureau Cotton Growers' Co-operative Association v. Clark, 160 La. 294, 107 So. 115 (1926). The court said: "We are dealing here with a special form of statutory contract, whose nature and legal effect are defined and determined by the act under which the contract has been made between the parties. It is clear, therefore, that such agreement need not conform to the essentials of an ordinary contract of sale as to the certainty of the price. Indeed, it would not be possible to fix a definite price in advance as to the resale of cotton in the future by plaintiff association, and carry out the object for which the association has been organized. To fix the price beforehand would defeat the very purpose of the association in its efforts to obtain the best price under market conditions."

See also Tobacco Growers' Co-operative Association v. Harvey, 189 N. C. 494, 127 S.E. 545 (1925).

sary for its successful execution.[21] The initial sale price, as is indicated in the raisin contract above quoted, is simply the amount of the established first advance payment to growers. The raisin growers' contract contains also (see Appendix H) a more detailed statement as to the pooling method of handling the crop and several clauses designed to secure its enforcement. To the latter, further reference will be made in the following chapter.

[21] For cotton and tobacco contracts see Appendices I and J.

CHAPTER IX

CONTRACT ENFORCEMENT DEVICES

The membership agreements which have been discussed in the preceding chapter fall under two general heads: (1) the maintenance or protection payment designed primarily to provide the running expense of the co-operative agency and thus keep it intact for use whenever the growers may wish to avail themselves of its services; and (2) the exclusive dealing contract, designed primarily to bring all of the product of the given body of producers under the control and into the hands of the marketing agency. This may be simply for the purpose of insuring a volume of business large enough and steady enough to permit of economical and efficient operation. In many cases, however, such measures are designed also to centralize control of a volume of product large enough to give to the selling agency a strategic position in the market and to strengthen its hand in "collective bargaining" with the large milk distributors, millers, packers, wholesale grocers, exporters, or others with whom they must deal.

In achieving the first purpose it becomes important, and in achieving the second still more essen-

tial, that the ranks of the membership be kept intact and actual deliveries be maintained up to 100 per cent of the expected amount. Besides the tangible loss of a service fee on products not delivered to the association, there is the intangible loss in terms of inability to live up to its commercial commitments or to maintain its position as a supplier of an important or even indispensable part of the total market supply. The crumbling of the whole marketing organization as a result of non-delivery of product is something which the executives and such members as wish to perpetuate the co-operative feel must be guarded against in every way possible, and for this it looks to the inclusion of suitable measures of enforcement in the growers' contract or in the by-laws which underlie it.

I. LIQUIDATED DAMAGES

The first of the devices designed to secure such enforcement is the stipulation of liquidated damages in such amount as would reasonably compensate for the imponderable as well as the more tangible elements of loss suffered by the association through the breach of his contract by a member. Of course the principle of liquidated damages had been in vogue among building contractors and others long before the co-operatives took it up. It had been introduced even in the relations of farmers to packing houses, sugar factories, and the like.

The general philosophy of the matter as applied

to co-operatives is somewhat fully set forth, presumably for the edification and instruction of courts as well as members, in the "uniform crop agreement" developed by the California Fruit Growers' Exchange. After declaring that the purpose of the association was "to maintain and to increase to its greatest efficiency the present co-operative fruit selling and marketing agency," the contract points out "that to accomplish this purpose it is necessary that each of the parties of the second part shall strictly and fully comply with and perform the stipulations of this agreement on his part, and therefore each of the second parties expressly stipulates and agrees that he will not sell or otherwise dispose of his said fruit to any person or corporation other than to said first party, as herein provided." But to discourage wilful sale [1] of the product to someone other than the association, it was further provided:

> The actual damages which will be sustained by the first party because of the failure or refusal of any of the second parties to pick and deliver his said fruit as herein provided, and the further detriment and injury to the first party because of the effect of said breach upon

[1] Passive resistance also was guarded against by a provision "that in case he shall fail, refuse, or delay to pick and deliver his said fruit to the first party within five (5) days after demand therefor, the first party shall have the right, at its option, at any time or times thereafter, and from time to time, to enter into the possession of his said premises and to pick his said fruit, or any part thereof, and take the same to the packing-house of the first party, and pack, sell, and market the same, all at his cost and expense, which said cost and expense shall and may be retained by the first party out of any monies received from the sale of any of his fruit."

the.....and its efficiency, and the expenses to which the first party will be put, and the damage caused by outlays incurred and to be incurred by it in providing means for selling and marketing the said fruit, are impossible now to estimate or fix, and therefore the same are estimated and agreed upon as twenty-five cents (25c) for each box of fruit grown or sold, which sum shall be allowed in any action brought by the first party to recover damages for the breach of this agreement by any of the second parties, should the first party elect, as it may elect, to bring such action.

Reference to the California law of 1909 will show that no special statutory provision had been made for the enforcement of contracts of this character. Their validity and enforceability depended simply upon fundamental principles of common law, reinforced by the general code provisions with reference to liquidated damages (see pp. 283, 304, and 314), or the discretion of the court sitting in equity to consider what relief should be granted in the event of breach or threatened breach in particular instances. This situation, however, did not produce results altogether satisfactory to co-operatives generally, and recent laws therefore have sought to secure a positive legislative declaration of public policy as to the type of contract which is approved and the measures which in their judgment might properly be invoked for its enforcement, instead of leaving this entirely to the views that particular courts might be found to entertain.[2]

[2] The extent to which such declarations are regarded as binding by the courts will be discussed in Chapters XII and XIII.

The first step toward covering the contract issue explicity in a statute came about when in 1917 the Bureau of Markets undertook to codify developments up to that time in the form of a bill suitable for passage by the several states and conforming to the requirements of the Clayton anti-trust law. The Department bill included a section authorizing by-laws requiring exclusive dealing, with the proviso that an annual opportunity for withdrawal be allowed to the member. To this it added a provision for liquidated damages as "specific, reasonable sums, in amounts fairly related to the actual damages ordinarily suffered in like circumstances," the section ending with the words: "And any such provisions shall be valid and enforceable in the courts of this state." [3]

[3] It is noticeable also that the Department of Agriculture in suggesting a form of marketing contract (see Appendix E) made a special effort to characterize liquidated damages as being a maintenance charge and not a penalty. Their clause read:

"Any member who fails to live up to his agreement, or fails or refuses to deliver his (Fruits and Vegetables) to the Association for sale in accordance with said agreement shall pay to the Association as liquidated damages the sum of.....for each .....of.....not delivered by him to compensate the Association for the loss sustained by the breach, and to enable it to meet and equitably distribute overhead and maintenance expenses involved in the operation of the Association, and in providing and maintaining facilities for handling and marketing the (Fruits and Vegetables) of its members; said sum may be deducted from any money due the member in the possession of the Association. This contract contemplates the delivery of the (Fruits and Vegetables) covered thereby, and not the payment of liquidated damages in lieu thereof."

In the Wisconsin law of 1921 is to be found an interesting development of the liquidated damages clause as follows:

"A provision in any such contract determining a specific sum to be paid by the member as liquidated damages for breach

In this matter we have an excellent illustration of the fact referred to earlier in the book that commercial practice characteristically outruns legislative enactment. While the above provision of the Department bill was being taken over by a number of states which passed legislation closely copied on that model, elsewhere contracts were being drawn with enforcement clauses much more elaborate and even more drastic than those enunciated in the Department bill. The California raisin association contract already referred to is perhaps the most conspicuous case. Their contract in 1918 provided (1) liquidated damages covering indirect as well as direct loss to the association, (2) a lien on the land, and (3) the contract to run with the land. These three clauses are as follows:

The parties hereto, fully understanding and admitting that it will be impracticable, or extremely difficult, to fix the actual damage to the Buyer which will result from the breach of this contract by the Seller, hereby expressly agree and stipulate that in the event of the Seller's willful neglect, failure or refusal to deliver to the Buyer the raisins purchased hereunder, the Seller will pay to the Buyer the sum of two cents per pound for all raisins covered hereby, and so undelivered, as liquidated damages for such breach; any judgment recovered against the Seller in any suit to enforce this contract or any right

of said contract shall be valid; provided, that the amount of said liquidated damages does not exceed one-fifth of the value of the products which are the subject of the breach."

The 20 per cent limit was later raised to 30 per cent. The significance of this proviso will be discussed in Chapter XII (footnote, p. 292).

thereunder to include a reasonable attorney's fee to be fixed by the court rendering such judgment.

In consideration of the agreements on the part of the Buyer herein contained, the Seller agrees that this contract is made for the benefit of, and is beneficial to, the land herein described, and that the obligation of the Seller to deliver all of said raisins, or to pay damages for failure to so deliver, shall be and remain a lien upon said land for the full term of this contract and the extension thereof, and such lien may be enforced in the same manner as other liens upon real property regardless of the ownership of said land.

This contract shall inure to the benefit of and bind the said land and the heirs, administrators, successors or assigns of the respective parties hereto.

The first of these three provisions has been given the specific sanction of co-operative statutes in most of our states. The last two have never been specifically recognized in any co-operative statute. They have been continued in the 1923 contract of the Sun Maid Raisin Growers, and stipulations of the same general character have been employed in other California contracts. For example, the Prune and Apricot Growers' membership agreement of 1921 contained the following provisions:

13. (a) If the Grower transfers any or all of his prune or apricot orchard, or any or all of the prunes or apricots owned or controlled by him, to any member of his family, by blood relation, or marriage, or to any Trustee, any such transfer shall be deemed to be subject to this contract; and such transferee shall be deemed to be obligated to deliver the prunes and apricots hereunder. In event of failure so to do, the Grower shall be obligated for liquidated damages, hereinafter provided, on the basis of

the amount of fruit covered directly or indirectly in such transfer, in addition to other remedies.

(b) Any such transfer, made by the Grower to any person, firm or corporation whatsoever after March 1st of any year, shall be conclusively deemed to be made subject to this agreement and all its obligations for that calendar year; and the transferee shall be obligated to deliver the prunes or apricots hereunder.

14. If the Grower places or permits to be placed a crop mortgage upon any of his crops during the term hereof, the Association shall have the right to take delivery of his fruit and to pay off all or part of the crop mortgage for the account of the Grower and charge the same against him individually.

The Grower shall notify the Association prior to making any crop mortgage. Failure to so notify the Association shall be deemed an attempt to evade the obligations of this contract improperly and shall invalidate the said mortgage as against the Association.

In Florida the practice has grown up of inserting in deeds to orchard lands a provision binding the purchaser of the land to market his fruit through the citrus association.

II. INJUNCTION AND SPECIFIC PERFORMANCE

Liquidated damages, however important, are not regarded by co-operatives as an adequate remedy. The co-operatives desire to secure the benefits of group marketing, not to recoup themselves for the loss of commercial profits. Hence they have supplemented the liquidated damages provisions with additional clauses covering injunction and specific performance. No such remedies were included in the raisin growers' contract in 1918, but with the

launching of the "commodity marketing" movement in the Pacific Northwest in 1919, provisions for injunction and specific performance were added to those covering liquidated damages. Clauses covering this phase of the contract were inserted in the draft of "The Co-operative Marketing Act," which grew out of this experience, and these provisions have been accepted by the legislatures of many of the states which have passed co-operative laws since 1920,[4] most of which have employed the following form:

Remedies for Breach of Contract. (a) The by-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the members or stockholders to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees, in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts of this State and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties.

(b) In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of

[4] Although a single instance in which similar provisions were employed is to be found in Kentucky some years earlier. The Kentucky pooling law of 1906 was in 1908 amended by the addition of the following provision: "To prevent any breach or violation of any contract made for the purposes set out in the foregoing sections, a restraining order and writ of injunction may be issued by a proper officer as prescribed in the Civil Code of Practice." Compare also footnote 6, p. 206.

specific performance thereof. Pending the adjudication of such an action and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member.[5]

[5] A third clause of this section, designed to lessen the difficulty of securing delivery in the case of tenant farmers, is found in the co-operative laws of most though not all of the states which have followed the Kentucky pattern. "(c) In any action upon such marketing agreement, it shall be conclusively presumed that a landowner or landlord or lessor is able to control the delivery of products produced on his land by tenants or others, whose tenancy or possession or work on such land, or the terms of whose tenancy or possession or labor thereon, were created or changed after execution by the landowner or landlord, or lessor, of such a marketing agreement; and in such action, the foregoing remedies for non-delivery or breach shall lie and be enforceable against such landowner, landlord, or lessor." Upheld in Feagain v. Dark Tobacco Growers' Co-operative Association, 202 Ky. 801, 261 S.W. 607 (1924).

A provision of the same general intent has been declared unconstitutional by the Supreme Court of Louisiana (Louisiana Farm Bureau Cotton Growers' Co-operative Association v. Clark, 160 La. 294, 107 So. 115 (1926)). The court held that "the tenants of defendant are third persons as to this marketing contract, entered into by and between defendant and plaintiff, Association, and the record is barren of evidence to show that these tenants had any knowledge of the marketing agreement of their landlord with said Association." The question might be raised whether this adverse decision might have been in any way due to the wording of the provision of the Louisiana law, which reads: "It shall be conclusively presumed that the products produced by any person, firm, or corporation during the period of time covered by such marketing contract, on the land of such member, however and by whomsoever produced, are the products of such member, and as such, are subject to said marketing contract." In the original manuscript of this book the author suggested that this phraseology might be considered less adroit than that of the Kentucky law and to have presented the matter in a somewhat unfavorable guise for the court's consideration. Reading the manuscript, Mr. J. G. Mitchell penciled a marginal question as to "whether 'adroitness' is sufficient to challenge the constitutional principles. If the legislature can impose 'conclusive presumptions' it can deprive the courts of all authority to hear and determine causes upon the evidence—it can convict by legislative fiat."

The remarkable vogue of "commodity marketing" laws during the last five years has put provisions for liquidated damages, injunctive relief, and decrees of specific performance on the statute books of a majority of our states. Occasionally, however, as in Ohio and New Jersey, the provisions covering injunction and specific performance have been omitted even when the body of the "standard act" has been accepted.

III. CHECKING INTERFERENCE BY OUTSIDERS

A third line of defense for the co-operative marketing contract has been attempted in the form of several clauses aimed at outsiders—traders, warehousemen, bankers, or the like—who might attempt to cause the defection of members or facilitate the delivery of the product to some private dealer in evasion of the co-operative marketing agreement. Only one such clause was included in the "commodity marketing" act as adopted by the states which first espoused it. This clause declared it to be a misdemeanor to induce breach of the marketing contract or to spread false reports about the management or finances of the co-operative association. The offense was made punishable by a fine of from $100 to $1,000, the offender being further "liable to the association aggrieved in a civil suit in the penal sum of $500 for each such offense." This is a considerably more drastic provision than the previously applicable common law under which the attempt to

induce breach of a contract was a tort for which the aggrieved party would be awarded such damages as he might be able to prove.

By the time the Bingham Act was passed (1922), a further section had been added, making warehousemen liable if they solicited or accepted goods from a co-operative member in violation of his marketing contract. This latter provision has been omitted by several states adopting the co-operative marketing act since that time,[6] and has not been added by amendment to any of the earlier statutes. The former provision, though more generally accepted, has been rejected by several states passing laws of this general type during recent years, for example, California, 1923; Ohio, 1923; Maryland, 1922; and Wisconsin, 1921. Even when the provisions have been included, they have in numerous cases been considerably modified, as for instance in the Indiana law of 1925, which does not make the mere inducing of breach of the marketing contract a criminal offense. The three provisions of this law are as follows:

Sec. 24. Inducing Breach of a Marketing Contract. Any person or persons or any corporation whose officers

[6] The amendments of 1908 to the Kentucky pooling law of 1906 made it unlawful "for any person to knowingly purchase [any part of a pooled crop] without the written consent [of the pool authorities], and upon conviction thereof, he or they shall be fined in any sum or amount not exceeding $250 for each offense, to be fixed by the jury in their discretion." It has already been mentioned that the Supreme Court of the United States found this law to be unconstitutional.

or employees knowingly induce or attempt to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association shall be liable to the association aggrieved in a civil suit in the penal sum of one hundred dollars ($100) for each such offense. In addition said person or persons or said corporation shall pay to the association a reasonable attorney's fee and all costs involved in any such litigation or proceedings at law.

Sec. 25. Spreading False Reports. Any person or persons or any corporation whose officers or employees maliciously and knowing spread false reports about the finances or management of any association organized hereunder shall be guilty of a misdemeanor and be subject to a fine of not less than one hundred dollars ($100) and not more than one thousand dollars ($1,000) for each such offense, and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred dollars ($500) for each such offense.

Sec. 26. Persons Liable for Damages for Encouraging or Permitting Delivery of Products in Violation of Marketing Agreements. Any person, firm or corporation conducting a warehouse or elevator or other receiving place or otherwise dealing in any agricultural products within the State of Indiana, who solicits or persuades, or who permits any member of any association organized hereunder to breach his marketing contract with the association by accepting or receiving such member's products for sale or for auction or for display for sale, contrary to the terms of any marketing agreement of which said person or any member of the said firm or any active officer or manager of the said corporation has knowledge or notice, shall be liable to the association aggrieved in a civil suit in the penal sum of one hundred dollars ($100) for each such offense; and such association shall be entitled to an injunction against such warehouseman or other person to prevent further breaches and a multiplicity of actions thereon. In addition, said warehouseman or other person shall pay to the association a reason-

able attorney's fee and all costs involved in any such litigation or proceedings at law.[7]

In summary, it may be said that the principle of liquidated damages has been accepted and expressly stated by the legislatures of more than 40 of our states in their several co-operative organization laws. Furthermore, practically all these states have declared it to be their public policy to allow the remedy of injunction against a member who threatens a breach of his contract and, with several further exceptions, have taken a position in favor of having the courts intervene to secure specific performance. In only 24 states has it been made a misdemeanor for third parties to induce breach of membership contracts, and in none has the device of making the contract run with the land been embodied in the law. Only eight states have adopted the provisions covering the acceptance of members' product by warehousemen.

As for the term for which exclusive dealing contracts may be drawn, several states which have largely followed the Department bill [8] have pro-

[7] In the Kentucky law this provision was followed by an explanatory sentence which is rather interesting, namely, "This section is enacted in order to prevent a recurrence or outbreak of violence and to give marketing associations an adequate remedy in the courts against those who encourage violation of co-operative contracts." One may infer that the proposer of this amendment had been an observer of the "Night Rider" disturbances of 1908. The Court of Appeals of Kentucky held this provision of the law constitutional (see p. 316), but the analogous clause of the Minnesota law was held invalid by the Supreme Court of that state about a month later, that is, June 5, 1925 (see p. 317).

[8] Such as New Jersey, Pennsylvania, and Iowa.

vided that a member must be given the opportunity to withdraw at some specified time during any year. In the majority of the states whose legislation has been strongly colored by the "standard marketing act," ten years is set as the maximum for such contracts, but several states have varied this to shorter or longer periods. Thus California lengthened the term to fifteen years and North Dakota curtailed it to five, while Wisconsin and Maryland set the limit at five years with the privilege of making contracts self-renewable for further periods not over five years in length. In Illinois the limiting phrase was dropped, thus conferring on associations the right to make exclusive contracts "for any period of time."

As a matter of practical operating convenience, it has at times been found undesirable to have all the contracts of a large association automatically terminate at the same time, thus subjecting the association to the effort and expense of re-signing the membership. Furthermore, such a formal renewal period tends to invite special attack by unfriendly interests upon the whole co-operative organization. To make the contract continuing is of course not feasible unless each individual member retains the right of withdrawal during a predetermined time in any year, and this practice has been used by various associations in California and elsewhere. Naturally it was well suited to the needs of associations that had already become some-

what established in their respective producing areas and that were aiming primarily at the attainment of a high degree of efficiency in commercial distribution rather than the attainment of a strong strategic position for collective bargaining activities. Mr. Sapiro and his followers felt clearly that a contract which could be cancelled any year was a broken reed upon which to lean when they came to undertake a campaign of co-operative organization among the previously amorphous elements that make up the cotton and tobacco industries.[9] It seemed hopeless to undertake to build up the machinery necessary for dealing effectively with these situations unless the associations were protected against disruptive efforts for a period of several years during which the organization could be shaken down, a suitable staff brought together, trained, and weeded out, and new and distinctive methods incident to such an undertaking experimented with and to some extent perfected.

Experience has shown that a mere legal contract, no matter how binding, will not hold an association together if the members do not have a belief in the principles of co-operation and confidence in the commercial ability of the association's management. Marketing philosophy among even the large-scale centralized co-operatives seems to be shifting its emphasis from aggressiveness in collective bargain-

[9] Somewhat the same situation has existed in the fluid milk regions.

ing and from the *quantitative* ideal in membership to emphasis upon skill in administering a volume of product large enough to secure a high degree of commercial efficiency and to the *qualitative* ideal with reference to membership, that is, a selected membership of persons who both can and will bring such a positive personal contribution to the work of the association as will keep expenses down, promote the quality and reputation of the product, and facilitate all the activities of the association.[10] Many associations that started with a contract non-cancelable for a period of three, five, or seven years are now changing this or making their renewal contract in a form permitting withdrawal at the end of any business year. Meanwhile, both through perfecting the service of the association and conducting educational campaigns with the membership, they are supplementing the legal force of the contract by a stronger cohesive bond of loyalty and satisfaction in the minds of the membership. All this change of course can take place without any modification of a law permitting exclusive contracts non-cancelable for a period as great as ten years or some other relatively long-time period. It is possible that some laws now having this clause will be so amended as to require that opportunity for withdrawal be given at the end of any year, as already suggested. However, it is the writer's belief that where such a

[10] See Moser, C. O., *American Co-operation*, 1925, Vol. II, p. 675; Mask, H. H. B., *ibid.*, Vol. I, p. 250; Nourse, E. G., National Association of Marketing Officials, *Proceedings*, 1925, p. 11.

change is made it should not impair the right on the part of an association to make contracts non-cancelable for an initial period of three years.

IV. SUPPLEMENTARY LEGISLATION

The provisions authorizing the use of contracts and specifying means for securing their enforcement to which we have thus far referred have all been such as were included in general enabling acts. In a number of instances, however, difficulties in the way of successful operation of co-operative associations have concerned not the co-operative agency itself, but the practices of other parties with whom their business was inevitably involved.

We have already seen one particular in which even the enabling act sought to regulate the conduct of other business with reference to the co-operative. This was in the matter of warehousemen (see page 206). But this clause did not fully meet the situation, since warehousemen were frequently juggling the names under which produce was received and sold in order to evade their responsibility. This situation was met first in Virginia, and later in other states, by a law making it a misdemeanor for a warehouseman to use a false or fictitious name in lieu of that of the actual owner of produce received by him and displayed for sale on the auction floor or otherwise.[11]

[11] The full text of this Virginia law is shown in Appendix K. The cases in which it was upheld by the Supreme Court of the state are discussed in footnote 28, p. 317.

A second type of supplementary legislation has concerned crop lien laws. Particularly in the cotton and tobacco sections, the landlord-tenant problem has been serious, but this is a matter which causes more or less difficulty in all parts of the country. We have already seen how various contracts attempted to avoid difficulty in securing delivery owing to the fact that the working farmer was in many ways not the sole and unencumbered owner of the product. The situation has been still further complicated by reason of the fact that in many sections the producer has been in the habit of mortgaging his crop as a means of securing credit to carry him through the production period.

The practice has been very prevalent among cotton and tobacco producers of giving a crop lien as a means of getting fertilizer, machinery, feed for work animals, and even food for the farmer and his family during the growing season. In the highly specialized potato region of Maine, the cost of fertilizer has been so great as to result in widespread use of the crop lien as a means of financing this heavy productive expense. General laws governing such liens have aimed to make the position of the lender very secure, but to make it extremely difficult for a co-operative association to function effectively. The general desire on the part of the co-operatives has been to assume responsibility for the discharging of such credit obligation out of the proceeds of the product sold by them for the farmer,

but not to allow the existence of this lien to interfere in any way with the crop coming into their hands and their administering it on a group basis without any interference from lien-holders which might cramp their action.

After considerable experience with this sort of difficulty a crop lien law drawn by persons sympathetic with the co-operative movement was adopted by the legislature of the state of Maine in June, 1925. This law [12] provides that the marketing agreement be recorded in the office of the register of deeds in the given county, together with a list of the names of all producers who have signed this agreement. This constitutes notice of the rights and claims of the association to the crops of these producers, who must then notify the association of the existence of any liens which they wish to have recognized. The lien-holder's right is, under this law, made subject to the association's right to market the crop, but the association in turn is of course obligated to settle with the lien-holder out of the proceeds if they are sufficient in amount or, if not, to turn the proceeds entirely over to the holder of the lien. This law seems destined to be copied widely, though with some local adaptation, in all sections where co-operative marketing has been actively developed.

As a last class of supplementary legislation we may note various state and Federal laws concern-

[12] For full text see Appendix L.

ing monopoly and restraint of trade. Inasmuch as the whole matter of clarifying the position of co-operative associations with reference to the problem of monopoly is so complicated and important, it must claim a separate chapter.

CHAPTER X

CO-OPERATION AND RESTRAINT OF TRADE

The first general farmers' organization movement in this country, the Grange, as well as some later movements of a similar sort, has been characterized as "the farmers' war against monopoly." Practically all of these general farm organizations have had also as one of their chief activities the promoting and fostering of co-operative business associations among farmers. The curious, not to say ironic, element in the situation is to be found in the fact that the most vigorous frontal attack upon any very large or effective development of the co-operative movement has been through efforts to outlaw such associations as being combinations in restraint of trade, and even on several occasions to use, in the effort to destroy the farmers' own organizations, the very "anti-monopoly" statutes whose passage had been secured through farmer initiative.

In view of the fact that so much opposition to the co-operative type of commercial organization has centered upon this question of restraint of trade, it seems well at this point to get the nature of the issue clearly in mind. In previous chapters we have

examined the distinctive structure of the co-operative association and certain salient features of its business practices. These discussions were designed to give a clear understanding of the whole situation in which the restraint of trade controversy has its setting. It has brought us at numerous points to the frontier of our present problem, but we purposely postponed joining the issue directly in order that we might first get clearly in mind the several details of structure, practice, point of view, and economic objective which are essential to its real understanding.

We have seen (1) that for reasons both of technical efficiency and of what they conceive to be economic justice agricultural producers have evolved a co-operative form of business organization and have demanded and, in the main, received for it the sanction of law. Under this form they have (2) developed various methods of operation designed to emphasize and maintain the solidarity of the co-operating group, the distinctive features of these arrangements being "exclusive dealing" and "pooling." The use of these methods under the co-operative form has on numerous occasions (3) raised the question of whether such co-operative enterprises were conspiracies in restraint of trade or monopolistic in their effect.

A great deal of confusion of thought has been revealed on the part of those who have discussed the subject or been actors in various parts of the

movement itself. We shall need to distinguish, on the one hand, monopoly as a supposed result of the great size of an organization and, on the other hand, restraint of trade as a result of qualitative peculiarities, no matter how small the fraction of a product they might concern or how insignificant an area of the business might be involved. We shall need to distinguish also very clearly between questions of form and of practice, examining on the one side the form of the association, the nature of its by-laws, the terms of its contracts, and the methods by which they are enforced, and on the other the separate though related question of the commercial and economic effects of the operations in any given case of associations so constructed and following such practices. Even when such an examination has brought us to a clear understanding of the question whether trade has or has not in fact been restrained, we find ourselves simply at the threshold of a new issue, namely, the significance and economic or social desirability of such a curbing or directing of economic enterprise. In other words, we are forced from questions of fact to issues of policy under the "rule of reason," which has become today the background of all our discussions of restraint of trade.

I. GROUP ACTION AND EXCLUSIVE DEALING

Let us begin our analysis with the simplest case—and the record shows that the issue has been joined

when very small organizations were involved and very mild forms of control had been undertaken. The co-operative association has frequently found itself subject to attack as a conspiracy or combination in restraint of trade even in the very elementary stages of its development. This has perhaps resulted from the fact that the organization is personal in character, and its members are patrons who participate actively in its management as contrasted with the impersonal investors who constitute the ordinary business corporation. The co-operative association has seemed to stand rather in the position of the trade union,[1] and to invite the scrutiny of the courts under the common law principle of restraint of trade even where only a handful of persons were involved, whereas a single exploitative corporation might attain to grossly disproportionate size without inviting any such attack, provided it had not combined with other corporations in the process of its development.

While the extreme restraint of trade doctrine as applied to labor organizations[2] was early abandoned, it has reappeared in the case of co-operative associations at a much later and indeed quite recent date. The issue has involved two general propositions: (1) that special restrictive devices have been used to secure group action; and (2) that the pur-

[1] Compare Commons and Andrews, *Principles of Labor Legislation,* Chapter III, and *Documentary History of American Industrial Society,* Vols. III and IV.

[2] Commons and Andrews, *ibid.,* p. 94.

pose of such concerted action has been to raise prices and that this was in its very nature against the public interest. In most cases where prosecution has been brought against a co-operative association it has been an outgrowth of positive measures adopted to secure the adherence of an individual to the association.[3] Such measures cover by-laws calling for exclusive dealing, maintenance or penalty clauses, and separate contracts carrying provisions for liquidated damages, specific performance, or other enforcement devices.

Two cases will serve to illustrate this phase of the matter. Doubtless there were numerous instances in which local courts strictly construed the common law principle that any combination of individuals for joint selling constituted restraint of trade, but the outstanding case in which a court of final jurisdiction took this extreme position is that of a farmers' organization in Iowa shipping livestock under a co-operative agreement which included a maintenance clause.[4]

The issue in the Decorah case was drawn on the fact that members agreed to ship all their hogs through the association or pay to the association the sum of five cents per hundredweight for anything shipped through another channel. The Su-

[3] A notable exception is found in the suit against the Aroostook Potato Shippers' Association (United States v. King, 229 Fed. 275 (1915), 250 Fed. 908 (1916)), because of their use of a secondary boycott against dealers.

[4] Reeves v. Decorah Farmers' Co-operative Society, 160 Ia., 194, 140 N.W. 844 (1913).

preme Court decided that this provision was in restraint of trade because "plaintiff was placed at a disadvantage and could not compete with the society in purchasing hogs from its members, and the members were not free to deal with plaintiff. If they dealt with him, he either forfeited his profits, by reason of having to pay too much for his hogs, or they forfeited a part of the purchase price as a penalty for selling to another." It is important to note that no suggestion was made that this arrangement had any effect in the direction of enhancing prices. The decision was made to rest very simply on the fact that the attempt to operate a producers' marketing organization must, in the nature of the case, somewhat interfere with the business of other middlemen and somewhat limit the freedom of action of the members in their own marketing activities.

The form of by-law under which this maintenance fee was to be collected was interesting in this connection. It read as follows:

> In order to insure future success and prosperity of this society its members and shareholders are required to sell all their marketable produce and livestock to the society. Any member or stockholder who may prefer to sell his produce or livestock to a competitor in this market shall forfeit to the company and pay over to its treasurer from the proceeds received for produce or livestock so sold to other firms or competitors, the amount as follows: Five cents for every one hundredweight sold to any competitor.

The court, however, took no account of the purposes for which the association was formed or the necessity and propriety of this means of attaining them. To their minds the technical limitation upon freedom of action was the paramount issue without regard for the question of the freedom of farmers to organize to sell their own product instead of allowing others to make a profit from it. In this they were taking a stand which, although the Decorah case has been urged by attorneys as a precedent many times since, does not seem to be upheld by judicial opinion today.[5]

The second incident to which we shall refer occurred in the state of Illinois nearly 20 years earlier than the Decorah case. Here a milk producers' association was declared to be a combination in restraint of trade and unlawful under the state anti-trust law of 1891.[6] There was a general agreement among the 1,500 members of this association that they would handle all their milk through the association, but there was apparently no mainte-

[5] Several courts have at various times gone so far as to take the position that, under such an interpretation of anti-trust law, practically any form of business organization beyond that of individual enterprise would be impossible. Indeed, such a view had been clearly expressed two years prior to the decision in the Decorah case by the Supreme Court of Mississippi in a case which did not involve agricultural products (Cumberland Tel. and Tel. Co. v. State, 100 Miss. 102, 54 So. 670 (1911)). In the following year the same position was taken by the Indiana Supreme Court in a case which did involve a farmers' association (the Gillaspy case cited on p. 355).

[6] Ford v. Chicago Milk Shippers' Association, 155 Ill. 166, 39 N.E. 651 (1895).

nance clause, liquidated damages, or other payment to be made in the event of non-delivery or the acceptance of a price other than that agreed upon between the association and the milk distributors. Here the court ruled that "the corporation, as an entity, may not be able to create a trust or combination with itself, but its individual shareholders may, in controlling it, together with it, create such trust or combination that will constitute it, with them, alike guilty."

The crime of which this association was guilty in the eyes of the court was that of combining to fix prices. The mere fact that they exerted their joint influence toward the establishment of a scale of prices was deemed to be sufficient, and no account was taken of the avowed purpose of the organization "to secure to the [producer] of milk a just return for the sale of the same; to rid the field of city distribution of irresponsible and dishonest dealers; to establish a central bureau of information for the shipper's benefit; and to secure to the dealer of milk a pure, wholesome, honest quality of that product." Nor did it attempt to ascertain what effect the association had in fact had on the price or quality of milk or the general organization of the business. The mere fact of joint action with a price objective was to their minds sufficient.[7]

[7] "That the object of the association is to control the price of the purchase and sale of milk to retail dealers within the limits of the city of Chicago is clearly apparent, and this object is carried out by the concurrent action of the members and asso-

In both these cases it should be remembered we are dealing with stock companies organized under general statutes, owing to the fact that no co-operative law had been passed in either of the states at that time. However, the co-operative character of the business undertaken was clearly established in the by-laws adopted and the practices which the associations actually were carrying on. How adequately these facts were presented to the court it is impossible to say; at all events, no account was taken of them in the decision handed down.

Close discrimination should be made between the two issues raised in these two cases. In the first, the question was simply whether a group of producers might bind themselves together to maintain their own selling agency. This might be done without exerting any particular effect upon the general price-making system. Such was the case with farmers' elevators, livestock shipping associations, the local fruit and vegetable organizations, and co-operative creameries and cheese factories characteristic of the early days of the co-operative movement. In the case of milk producers' associations from the start, however, there has been introduced the principle of collective bargaining for a larger or smaller mass of product over which control

ciation; by the action of the association on the one part, aided by the agreement of its members who, assenting to the constitution and by-laws, carry out a scheme which is a combination, agreement, or trust by which they fix the price of an article of merchandise, and limit the amount to be sold within the corporate limits of the city of Chicago."

has been secured through the formation of the co-operative association. This raised the question whether all collective bargaining on the part of producers was to be viewed as contrary to public policy, or whether it should be considered proper and lawful in and of itself, leaving the question of propriety of particular acts to subsequent determination by the courts.

As we shall see in a later chapter, the view that collective bargaining as such is not contrary to public policy has rapidly gained acceptance, aided perhaps somewhat by the earlier development of this position with reference to collective bargaining on the part of labor unions. Early co-operative laws, however, made no specific mention of this as a particular power conferred upon associations formed under their provisions. In the course of time these statutes of the Rochdale type were in several states strengthened by amendment or additional laws providing for joint selling. We have noted (see page 126) the Minnesota statute of 1907, authorizing overhead selling federations. A further step was taken in that state in 1919, when the Rochdale law of 1913 was amended as follows:

> It shall be lawful for such an association or associations to sell its own products as well as the products of its members for them either individually or collectively and to negotiate the price at which such products may be sold either for itself or for its members individually or collectively as the case may be. Co-operative associations heretofore formed under this Act and their action

in relation to any of the things now or by this amendment authorized are hereby validated and declared lawful.[8]

In the same year an amendment of similar import, though of very mild form, was introduced into the Wisconsin co-operative law, but in the main the attempt to secure positive sanction for collective bargaining methods has been developed in a type of laws subsequent to those of the Rochdale pattern. This movement serves to illustrate not merely the effort to legalize joint selling arrangements, but also the tendency of such a development to raise more sharply the issue of monopoly.

II. "COMMODITY MARKETING" AND MONOPOLY

The trend during the last 30 years, and particularly the last decade or more, has been toward putting collective sale on a more stable basis, toward organizations of larger scope, and toward more complete control of the member and his product. "Commodity marketing" stresses and enlarges the collective bargaining or joint selling idea, laying emphasis not merely on the pooling of the product, but also upon making this pool embrace a percentage of the business large enough to constitute the association a decisive or at least significant factor in the deter-

[8] *General Laws of Minnesota,* 1919, Chapter 382. The influence immediately back of this amendment was the fact that the Twin City Milk Producers were at this time already under indictment as a conspiracy in restraint of trade, and the last sentence of this clause was designed specifically to pave the way for the dismissal of that suit.

mination of price. "Commodity control" would perhaps be a more truly descriptive phrase than "commodity marketing."

It would seem to go without saying that co-operative marketing after any such pattern constitutes restraint and is indeed definitely intended as a restraint upon utterly free individual bargaining. Co-operation is ordinarily presented as a remedy for the ills of competition, the whole idea being that group marketing must be resorted to as an escape from the cut-throat competition resulting from what the proponents of "commodity marketing" rather picturesquely call "dumping." [9] By this they mean the placing of the product on the market in small units through competitive selling by unorganized individual producers [10] presumably devoid of any extensive knowledge of market conditions, or possessed of any specialized merchandising ability, adequate storage or financing facilities, or other

[9] "Orderly marketing is thus offered by the co-operators as a substitute for the after-harvest dumping that has characterized farm marketing since farm products first entered into commerce. Farm commodities are dumped rather completely under the individual system of selling. Take wheat, for example; that product is harvested during a period of about ninety days in the United States. One year with another almost 75 per cent. of the American wheat crop moves from the farm into the elevators and mills within a ninety-day period, and the movement would undoubtedly be even more rapid if the railroads could handle the crop in less time. . . . Dumping perishable commodities takes a somewhat different course. . . . With perishables, co-operative marketing prevents gluts by proper routing of shipments, which is only another form of orderly marketing." Steen, Herman, *Co-operative Marketing*, pp. 293-295.

[10] Or by the only slightly more adequate manager of a small local organization.

qualifications that would place them in a strategic position equivalent to that occupied by the much smaller number of large and highly organized consumers or distributors of the same product.

The frank statements as to the purpose of the modern type of co-operative organizations to control the member's product and acquire a strong position in the selling market practically estop them from maintaining in the future that they are not in fact, as in purpose, combinations to restrain competition. Further than this, they have frequently enunciated it as a principle of co-operative organization that business should not be begun until a large percentage of the crop of a given region has been contracted to the association. Such percentages have frequently been stated as 60 to 75 per cent, and in actual practice several successful associations have secured an even more dominating position in the industry. "Many of the important California agricultural co-operative associations control the greater portion of their respective crops. The California Fruit Growers' Exchange, for example, controls over 70 per cent of the citrus crop; the California Associated Raisin Growers over 80 per cent of the raisin crop; the California Almond Growers' Exchange 80 per cent of the almond crop; the Central California Berry Growers' Association 85 per cent of the local territory; and the California Peach Growers, Inc., 75 per cent of the dried peach crop. Economists claim that a monopoly is essen-

tial to the success of such organizations.[11] . . . A co-operative association restrains competition among its members. They no longer compete with one another for the patronage of the packer or commission house. They compete in the quantity and quality of production, but not as to the sale of their product. The courts have recognized that a mere restraint of competition may be entirely different from restraint of trade. Most of the California co-operative associations have stimulated rather than restrained trade." [12]

III. ATTEMPTS TO EXEMPT FARMERS FROM ANTI-TRUST LAWS

But admitting the existence of restraint, the sentiment of the public and the courts with reference to combinations among farmers has profited by the

[11] "The co-operative association must have a substantial monopoly in order to live Herein of course lies a menace to the consumer. So far, all the evidence relating to the California experiment points to a small reduction in prices to the consumer, and, what is perhaps more important, a greatly enhanced and improved service to him as a result of co-operative marketing. . . . It seems hardly possible that the state-fostered co-operative monopolies will become a Frankenstein. But there is the possibility that some day the market director may have to discipline his progeny as does every other father." Plehn, Carl C., "The State Market Commission of California," *American Economic Review,* March, 1918, pp. 25-26.

[12] Arndt, Stanley M., "The Law of California Co-operative Marketing Associations," *California Law Review,* July, 1920, pp. 287-288.

Mr. Arndt's statement as to the monopolistic position of co-operatives is extreme. The California associations which he has picked for illustration are far from being typical of the co-operative associations of the United States as a whole. For a very different situation and the reasoning of a court with reference to it, see the Washington Cranberry Growers' case on p. 359.

progress already made with reference to combinations of laborers and to large-scale corporate organizations. Co-operative laws, as we have seen in preceding chapters, have clearly authorized the combining of individuals into groups for the express purpose of collectively marketing their products, and have authorized forms and practices which make it possible to construct large-scale organizations and to secure a substantial degree of control over the product of the members. State legislatures have thus authorized combinations which would give to groups of producers a substantial degree of monopoly within their particular fields.[13]

[13] When farmers came to feel it necessary for them to develop large-scale marketing enterprises, they found their situation rendered peculiarly difficult. In the first place, rather particular efforts had been made to prevent combinations which might have the effect of controlling products of the soil. This had been due to the consumer's desire to protect himself against dealers who might hoard food products or speculate for the advance of their price, and was something of a holdover from the old days of special legislation against forestalling, engrossing, and regrating. Second, however, the farmer himself had, as mentioned in the first paragraph of this chapter, exerted his efforts toward imposing stringent restrictions upon combined action of dealers who handled products of the farm. It had been easy to secure the assistance of the consumer interest in obtaining legislation to curb speculative and monopolistic middlemen and to provide that any combination tending to restrict the freedom of agricultural markets was against public policy, to be dealt with severely as a criminal conspiracy. Such laws sometimes proved embarrassing to farmers when they themselves attempted to develop large-scale marketing organizations.

In both Texas and Illinois, legislation was passed designed to exempt farmers from the operation of these general anti-trust laws, but in both places they were declared unconstitutional. See pp. 334 and 336. Similarly, the Kentucky pooling statutes of 1906 and 1908, which were essentially amendments to the anti-trust law of that state, were declared unconstitutional. See footnote 4, p. 159.

Furthermore, the attempt has in many instances been made not merely to pass an enabling act covering associations of the co-operative type, but also to declare it to be a matter of public policy that such associations of farmers be set up and operated, and to recognize certain methods of operation in advance (such as collective bargaining, pooling, exclusive contracts, and special enforcement devices) as a necessary and proper part of their machinery.

Neither the earlier state laws nor the Department bill of 1917 dealt specifically with the question of restraint of trade. As it happened, however, the issue almost immediately after that year took on a more acute form in many parts of the country, and those who were concerned to allow co-operation to proceed unmolested felt it to be important that there be a specific declaration of the intention of the state legislature that associations of certain forms should not be subject to prosecution.

The circumstances which precipitated this action were, first, the war-time arrangements for control of agencies dealing in foodstuffs or basic raw materials such as seemed to enhance or threaten the enhancement of prices and, second, the launching of large-scale co-operative associations under strong centralized forms of organization, aiming at more effective control along "commodity marketing" lines. In the latter instance the device adopted to protect the association against prosecution under anti-trust statutes was embodied in part in the

declaration of purposes presented as a preamble to the law, and in part in two sections, the text of which (as found in the Kentucky statute) is presented below.

1. In order to promote, foster, and encourage the intelligent and orderly marketing of agricultural products through co-operation; and to eliminate speculation and waste; and to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; and to stabilize the marketing of agricultural products, this act is passed.

5. . . . It is here recognized that agriculture is characterized by individual production in contrast to the group or factory system that characterizes other forms of industrial production; and that the ordinary form of corporate organization permits industrial groups to combine for the purpose of group production and the ensuing group marketing and that the public has an interest in permitting farmers to bring their industry to the high degree of efficiency and merchandising skill evidenced in the manufacturing industries; and that the public interest urgently needs to prevent the migration from the farm to the city in order to keep up farm production and to preserve the agricultural supply of the nation; and that the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind, unscientific and speculative selling of crops. . . .

28. Any association organized hereunder shall be deemed not to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this state; and the marketing contracts and agreements authorized in this act shall be considered not to be illegal nor in restraint of trade nor contrary to the provisions of any statute enacted against pooling or combinations.

Many of the states which have modeled their legislation on the "standard marketing act" have carried these provisions over for the instruction of courts in the future as to what was the intention of the lawmakers. Others, however, have deleted them wholly or in part, leaving the whole matter to the courts under general statutes or common law principles applicable to all business organizations. In a few states specific exemption statutes have been enacted. In Illinois the issue grew out of a milk producers' case, which in turn was part of a campaign to reduce or hold in check the cost of living. Illinois had not up to that time (1919) been a leader in co-operative legislation, and it appeared that the form of organization used by the milk producers did in fact constitute a technical infraction of the anti-trust law of the state. As a result, immediate steps were taken to amend this law, an effort which resulted in the inclusion of the following section in the anti-trust statute of the state.[14]

Associations, corporate or otherwise, of farmers, gardners [gardeners] or dairymen, including livestock farmers and fruit growers, engaged in making collective sales or

[14] In signing this law Governor Lowden commented as follows: "To deprive the farmers of the right of collective bargaining is to deprive them in effect of all right of bargaining. If the individual farmer must act alone in the sale of his products, he is obliged to take whatever price is offered. Therefore he is not in a position to deal equally with the great concerns with which he must do business. The farmer is dealing largely with the products of his own toil. Therefore, to admit the principle of collective bargaining as applied to men in other industries and to deny it to the farmer is unjust discrimination."

marketing for its members or shareholders of farm, orchard, or dairy products, produced by its members or shareholders are not conspiracies. Contracts, agreements, arrangements [or] combinations made by such associations or the members, officers, or directors thereof in making such collective sales and marketing and prescribing the terms and conditions thereof are not conspiracies and they shall not be construed to be injurious to the public trade.

A somewhat similar situation had developed in New York the previous year, when the officers and executive committee of the Dairymen's League, Inc., were indicted under the anti-trust law of the state because the directors had met, discussed, and named the price at which milk would be sold to distributors. Even in 1917 the League had drafted amendments to the provisions of the penal code and the general business law of the state of New York covering contracts in restraint of trade and had presented these to the legislature. They were not adopted at that session, but were again presented to the new legislature in January, 1918. "Undoubtedly the laying of the indictment accelerated action in the legislature, as both of the statutes were amended at that session. . . . In the early summer of 1918 the District Attorney of New York City asked to have such indictments dismissed, predicating his request upon the amendments to the statute." [15]

[15] The quotation is from a letter written by John D. Miller, Vice-President and General Counsel of the League, to the author. In 7 Cornell Law Quar. 293, Judge Miller discussed this New York legislation and exemption statutes in general. The letter referred to above explains further that amendments of the same

The amendment to the penal code read as follows:

Associations, corporate or otherwise, of farmers, gardeners, or dairymen, including livestock farmers and fruit growers, engaged in making collective sales or marketing for its members or shareholders of farm, orchard, or dairy products produced by its members or shareholders are not conspiracies. Contracts, agreements, arrangements, or combinations heretofore or hereafter made by such associations or the members, officers, or directors thereof in making such collective sales and marketing and prescribing the terms and conditions thereof are not conspiracies and they shall not be construed to be injurious to trade or commerce.[16]

The provision added to the general business law read:

The provisions of this article shall not apply to co-operative associations, corporate or otherwise, of farmers, gardeners, or dairymen, including livestock farmers and fruit growers, nor to contracts, agreements, or arrangements made by such associations.[17]

general purport as those offered by the League were submitted also by a member of the legislature "and in passing through the legislative mill his amendment to the general business law and our amendment to the penal code were adopted. [This explains the marked] difference between them as to phraseology. However, this is probably not material as affecting the law, as one adequate declaration, being the last expression of the legislature, is sufficient."

[16] *Laws of New York*, 1918, Chapter 491. These two sentences immediately follow the declaration of the old law which said: "The orderly and peaceable assembling or co-operation of persons employed in any calling, trade, or handicraft for the purpose of obtaining an advance in the rate of wages or compensation, or of maintaining such rate, is not a conspiracy." In its amended form, therefore, the law would seem to put collective bargaining among laborers and among farmers on the same footing in relation to anti-trust statutes.

[17] *Laws of New York*, 1918, Chapter 490. At almost the same time that these amendments were passed, the legislature also passed a co-operative enabling act patterned closely on the De-

When in 1921 Iowa passed a law patterned primarily on the Department bill, no reference to the restraint of trade issue was included in the enabling act itself, but a companion act was passed authorizing associations so organized, "and other incorporated associations or companies, organized without capital stock and not for pecuniary profit, to act together in associations, corporate or otherwise, for the purpose of collectively producing, processing, preparing for market, handling and marketing products of the members of such associations; permitting contracts between such associations and the members thereof which provide for liquidated damages; . . . and such persons may organize and operate such associations, and such associations may make the necessary contracts and agreements to effect that purpose, any law to the contrary notwithstanding." [18]

In Ohio the issue came up in connection with the arrest of seven directors of a comparatively small milk producers' association as part of a public campaign to check profiteering or organized efforts to advance prices. The case against this association was rather promptly dismissed by the courts, but the serious (and apparently needless) humiliation

partment bill, and all three measures "received executive approval at substantially the same time, and being one program of legislation are *in pari materia,* and by the well-known rule of construction should be construed together." (7 Cornell Law Quar. 300.)

[18] This law, however, conferred exemption not upon farmers as a class, but upon all persons who might see fit to employ the co-operative form of organization. (Compare p. 404ff.)

and inconvenience to which the officers were subjected led to a rather positive desire for some statute clearly protecting such associations from similar occurrences in the future. This milk producers' case occurred in 1919, and the resultant statute [19] was passed in 1921. Certain distinctive features of this measure make it an interesting link between earlier laws and subsequent Federal legislation.[20] It anticipated the Capper-Volstead Act [21] in providing a special agency for review of the acts of associations and it vested regulatory power in the state public utilities commission. The provisions of this law therefore deserve some attention in passing. Stating that "all such [22] associations or companies, when so formed, are hereby declared to be charged with a public interest and use and subject to supervision and regulation," it vests such regulatory powers in the public utilities commission as follows:

That if the public utilities commission of Ohio shall have reason to believe that any such company or asso-

[19] *Laws of Ohio,* 1921, p. 50. Repealed in 1923.

[20] In point of fact the first movements to exempt farmers' associations were made by the Federal Congress. Discussion of these measures, however, is deferred to the following chapter.

[21] See pp. 252ff.

[22] That is, "operated for the mutual benefit of the members thereof, as such producers, and conforming to one or both of the following requirements; first, that no stockholder or member of an association is allowed more than one vote because of the amount of stock or membership capital he may own therein, and the member ceasing to be a producer of farm products shall have no vote; or second, that the association does not pay dividends on stock or membership capital in excess of 8 per cent per annum."

ciation restrains trade or lessens competition to such an extent that the price of any agricultural product is enhanced beyond the cost of production, plus a reasonable profit, by reason of such company or association, it shall serve upon the president or chief officer of such company or association, or if its president or chief officer cannot be found, by a copy left at the office or usual place of business of such company or association with the person having charge thereof, a complaint stating its charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, before the public utilities commission specifying a day and place not less than thirty days after the service thereof, requiring the company or association to show cause why an order should not be made directing it to cease and desist from so restraining trade or lessening competition in such article. An association or company so complained of may, at the time and place so fixed, show cause why such order should not be entered. The evidence given on such a hearing shall be reduced to writing and be made a part of the record thereof. If, upon such hearing, the public utilities commission shall be of the opinion that such company or association restrains trade or lessens competition to such an extent that the price of any agricultural product is, or is about to become, enhanced thereby beyond the cost of production, plus a reasonable profit, or is engaging in any unlawful practices, it shall issue and cause to be served upon the company or association in the manner hereinbefore provided for serving complaint an order reciting the facts found by it, directing such company or association to cease and desist therefrom.

There seems to be a certain amount of confusion in regard to this whole matter of the so-called exemption of farmers' associations. Such statutes have repeatedly been attacked as unconstitutional under the Fourteenth Amendment since they give

special treatment to a particular class. They have been defended, however, on the ground that this constitutes a perfectly proper classification.[23] The merits of this issue as thus far adjudicated will be examined in Chapters XVI and XVII. The point has arisen only with the more recent laws. Not only did the earlier laws not contain the stringent control features which have been subjected to attack in the case of the "standard marketing act," but also they were in nearly all instances drawn as general, not merely agricultural, laws.

In summary, legislators have met fairly the question whether a particular type of strong association was to be permitted and have answered this question in the affirmative, but they have not been able in the law to place definite limits upon the operations of these organizations such as would safeguard

[23] "The hardest thing I have got to fight in all these cases is this so-called class legislation. How do we fight it? Why we say of course farmers are a class, but states can have class legislation so long as there is a natural distinction between that class and every other class. You can even tax, as they did in Pennsylvania, bituminous coal, where you do not put the same tax on anthracite coal, and the United States Supreme Court held that that was proper classification. You may classify if there is a natural difference . . . We are entitled to exemption. Why? Because we, as producers' groups, are different from all speculator groups. Our interest is in the land that keeps producing all the time. Speculator groups are interested only in the margins made by their money. Agriculture is characterized by individual production. All other forms of industry are characterized by group production and group organization. We have insisted that we are distinct and different." Sapiro, Aaron, "State and Federal Legislation Relating to Co-operative Marketing," *Proceedings* of the Third National Co-operative Conference, 1925, pp. 53-54.

the public from any possible harm. In a few instances co-operative legislation itself has specified that the associations formed thereunder should be for the purpose only of carrying out "legitimate and proper functions," or should be permitted to seek profitable prices only so long as they were "fair and reasonable" or did not "unduly enhance" the cost. In many other cases, however, the law has merely authorized a particular form of association under the tacit understanding, no doubt, that its actions, like those of other business organizations or individuals, would be subject to review by the courts. Case law on the matter will be discussed in Chapters XIV and XV.

CHAPTER XI

FEDERAL ACTION WITH REFERENCE TO CO-OPERATION

It would have been impossible to carry our discussion of co-operative laws to this point without some reference to the fact that Federal legislation also has been sought and in some measure secured. The Congress of the United States has expressed itself with respect to co-operatively organized business on several occasions and with varying degrees of conclusiveness. At times the suggestion has been made that there should be a Federal incorporation statute. No great strength, however, has been manifested in this movement, and in the main the Federal measures have been concerned with the restraint of trade issue which we have just been examining. Hence detailed discussion could conveniently be deferred to this point.

I. THE SHERMAN ANTI-TRUST ACT

There appears to have been from the beginning of Federal anti-trust legislation a realization that sooner or later the issue as to rural business organization would have to be faced.[1] Early in the

[1] Compare Jones, Franklin D., "The Status of Farmers' Co-operative Associations under Federal Law," *Journal of Political Economy*, July, 1921, p. 595.

debates leading to the passage of the Sherman Anti-Trust Act of 1890 references were made to the position of farmers' organizations under the prohibitions of that law. When the bill was reported back to the Senate from the Committee on Finance, Senator Teller took exception to it and said:

> There are legitimate and proper efforts that can be made for the advancement of prices. This refers to reduction in price as well as to advance in price. . . . I know it will be said in answer that these things should be left to the natural course of affairs, of commerce, and trade. But there has been recently organized all over this country what is called the Farmers' Alliance. What is the object and what is the purpose of it? The very purpose of it is to increase the price of farm products, and that I regard as a thing most desirable to be done, and I regard it as absolutely essential to the prosperity of this country. There has recently been organized what is called a National League amongst the farmers for the same identical purpose that the Farmers' Alliance has been organized for. Shall it be said that these organizations are forbidden by law? Is it possible that we are putting it in the power of some men to coerce and force the farmers to abandon these organizations? Does anybody believe that these organizations are inimical and hostile to the public welfare? On the contrary, does not everybody know that unless we can by some method increase the price of farm products in this country a great many farmers in the United States will be in bankruptcy and turned out of their homes? . . . While I am extremely anxious to take hold of and control these great trusts, these combinations of capital which are disturbing the commerce of the country and are disturbing legitimate trade, I do not want to go to the extent of interfering with organizations which I think are absolutely

justifiable by the remarkable condition of things now existing in this country.[2]

To this Senator Sherman responded:

> The bill as reported . . . does not interfere in the slightest degree with voluntary associations made to affect public opinion to advance the interests of a particular trade or occupation. It does not interfere with the Farmers' Alliance at all, because that is an association of farmers to advance their interests and to improve the growth and manner of production of their crops and to secure intelligent growth and to introduce new methods. No organizations in this country can be more beneficial in their character than Farmers' Alliances and farmers' associations. They are not business combinations. They do not deal with contracts, agreements, etc. They have no connection with them. And so the combinations of workingmen to promote their interests, promote their welfare, and increase their pay if you please, to get their fair share in the division of production, are not affected in the slightest degree, nor can they be included in the words or intent of the bill as now reported.[3]

Apparently Senator Sherman had in mind only one type of farmers' organization, namely, that of an educational and advisory character. Others, however, realized the significance of the movement among farmers to develop organizations for effective commercial action. This is indicated in the remarks of Senator Stewart on the following day. Said he:

> There is a trust which has put up the price of beef, a trust that we have been investigating and want to remedy.

[2] *Congressional Record,* 51st Congress, 1st Session, p. 2561.
[3] *ibid.,* p. 2562.

There is a plain remedy for that trust, not in legislation perhaps, but in the action of the parties interested. Farmers who are producing beef have to sell it at an enormous sacrifice, at starvation prices. Cattle are cheap all through the country. Still beef is high in Chicago. Suppose the farmers in the West should unite and say, "We will not sell our beef except at a certain price." Suppose they should unite to beat this combination; they would all be criminals under this bill; they could not combine to beat it at all.

Suppose, again, a combination is formed in Chicago by citizens of Chicago, not citizens of different States, but all citizens of Chicago, to bear the prices. The farmers of different States would have no right to combine and say, "We will not sell any wheat; we will help each other; we will advance money to each other; we will not sell any wheat until this combination is broken up; we will not allow them to sell our wheat short, to sell something they have not got and bear the market, and we will not take our wheat to market to be robbed." That they could not do under this proposed law. They would be liable to all the pains and penalties of the law if they did. . . .

This measure strikes . . . at the very root of co-operation. . . . Co-operation is necessary; but co-operation has its evils. When capital is combined and strong, it will for a time produce evils, but if you take away the right of co-operation you take away the power to redress those evils; it gives rise to monopolies that are protected by law, against which the people can not combine. They can not have other monopolies equal to them. It is that which depresses the people.[4]

This aspect of the matter was accepted even by Senator Sherman to the extent of proposing an amendment to the bill[5] in the following terms:

[4] *ibid.*, p. 2606.

[5] In offering this proviso Senator Sherman said: "I do not think it necessary, but at the same time to avoid any confusion, I submit it."

Provided, that this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers made with a view of lessening the number of hours of their labor or of increasing their wages; nor to any arrangements, agreements, associations, or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of their own agricultural or horticultural products.[6]

After some discussion of this and other amendments, "on March 27, 1890, the bill was recommitted to the Judiciary Committee, and on April 2 it was reported out, completely changed in its form and its provisions. The exception clause which had been engrafted upon it by a committee amendment before its recommittal was entirely eliminated from the bill. After that—and I think I speak advisedly from a considerable examination which I have given the record myself, as well as by valuable assistants in my office—no reference was made to the question of the application or non-application of the provisions of the Sherman law to labor or agricultural organizations. So much it seems to me should be said in the interest of the history of that legislation. The fact that such exemptions were placed in the bill and later taken out by the committee, and its action afterwards confirmed by the Senate, clearly indicates an intention on the part of the Congress to make no exceptions." [7]

[6] *Congressional Record,* 51st Congress, 1st Session, p. 2726.

[7] *Congressional Record,* 63rd Congress, 2nd Session, p. 13,908. This was Senator Pomerene's explanation of the proposal to exempt farmers' associations from the Sherman Act in 1890 and

Co-operative organization in agriculture was at that time in a very embryonic stage, and it would seem more remarkable that the question was raised at all than that Congress ended by dismissing all such proposals for special treatment.

II. THE CLAYTON ACT

When, however, in 1914 the movement for modification of our national anti-trust legislation came to fruition, farmers' co-operative associations had grown in numbers and had spread widely in area. Numerous state co-operative laws had been enacted, and there was a fairly active interest in securing a positive statement protecting farmers' (and laborers') associations from a statute designed primarily to curb the monopolistic tendencies of the industrial "trust." [8] The result was a clause defining a distinctive type of agricultural association which would not be regarded *per se* as a combination in restraint of trade.

was included in his discussion of the Clayton Amendment on August 18, 1914.

[8] Though the matter had been under consideration at an earlier date and efforts made to secure such an amendment. President Roosevelt in a message to Congress on March 25, 1908, had urged it, and on May 14, 1910, Mr. Cantrell of Kentucky had introduced in the House a bill amending the Sherman Act to exempt "any contract or combination in any form, the purpose of which is to secure to growers or producers of agricultural products or livestock a reasonable price therefor." See Congressional Record, 61st Congress, 2nd Session, Vol. 45, Part 6, p. 6273. This proposal grew out of the arrest of eight prominent citizens of Kentucky and the infliction upon them in Federal court of fines ranging from $100 to $1,000 each for conspiring to interfere with the movement of Burley tobacco in interstate commerce.

This measure has already been presented in the course of our discussion and its significance to the co-operative movement in some degree set forth (page 75ff). We shall have occasion also in later chapters to see how the courts have viewed this act; but we should note here that what it really did was not to single out a particular class in the community and declare that this class might pursue a line of conduct forbidden to others. It defined a particular type of business organization for mutual benefit rather than commercial profit and declared that this form of business organization did not fall under the prohibitions of the anti-trust law, even though a literal application of its phraseology might seem to embrace it. The definition employed did not apply to all or even the dominant element of the so-called co-operative organizations of the time, and hence was by no means a statute of exemption to farmers as a class. The text of the section was as follows:

Sec. 6. That the labor of a human being is not a commodity, or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural associations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organization from lawfully carrying out the legitimate objects thereof; nor shall such organization, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

It has been said that "this section in the last analysis was an empty victory. Its sole effect so far as farmers' organizations were concerned was to establish the legality of such organizations *per se* so that they could not be dissolved if they were truly co-operative organizations instituted for the purpose of mutual help, without capital stock, and if they were not conducted for profit. The section was so drawn that such an organization, or its members, committing acts of a character violating the anti-trust acts remained liable to the penalties of these laws." [9] To this estimate of the value of this measure the writer by no means subscribes. In the light of what has been said in the previous chapter concerning the tendency to regard any co-operative association of persons for commercial purposes as a conspiracy in restraint of competition under anti-trust acts or common law principles, it seems a rather tangible victory to have secured an affirmative statement defining a type of organizations which were not to be construed as illegal combinations whose mere existence was forbidden.[10]

[9] Jones, Franklin D., *ibid.*, p. 596.

[10] "All that the provision does with reference to farmers' organizations is to recognize their legal existence purely for mutual help, yet if they go out and by combination with reference to their commodities violate the Sherman law, like other instrumentalities, they will be subject to the law just the same . . . It may be . . . that for such acts an organization could now be dissolved while after the passage of this provision it might not be; but even if this is so, it could be restrained from doing the unlawful act and then there could be no objection to continuation as an organization." *Congressional Record,* 63rd Congress, 2nd Session, pp. 14012-14017.

From the standpoint of many of the co-operatives themselves, however, the Clayton Act was distinctly unsatisfactory both by reason of the terms of its definition and because of the fact that it afforded no protection whatsoever in the matter of practices followed by co-operative organizations.[11] They were diligent therefore in the effort to secure further legislation which would remedy these shortcomings, and their efforts were crowned with success in the passage of the Capper-Volstead Act of 1922. Before passing on to a discussion of this statute, however, it is worthy of notice that the feeling that farmers' organizations as such should have special treatment gained incidental recognition from Congress on several occasions. For example, the Food Control Act of 1917 laid strong prohibitions on any action tending to enhance the cost of food, but made express exception of farmers. Section 26 of the law is the one which was significant for co-operatives.

That any person carrying on or employed in commerce among the several states, or with foreign nations, or with

[11] Some light is shed on the judicial interpretation of Section 6 of the Clayton Act by the decision of the Supreme Court of the United States in Duplex Printing Press Company v. Deering (254 U.S. 443 (1921)). This was a labor union case, and the court said: "The section assumes the normal objects of labor organizations to be legitimate, and declares that nothing in the Anti-Trust Laws shall be construed to forbid the existence and operations of such organizations, or to forbid their members from lawfully carrying out their legitimate objects; and such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade." A similar construction of the section with reference to co-operative organizations would be in accordance with the view expressed by the writer above.

or in the territories or other possessions of the United States in any article suitable for human food, fuel, or other necessaries of life, who, either in his individual capacity or as an officer, agent, or employe of a corporation or member of a partnership carrying on or employed in such trade, shall store, acquire, or hold, or who shall destroy or make away with any such article for the purpose of limiting the supply thereof to the public or affecting the market price thereof in such commerce, whether temporarily or otherwise, shall be deemed guilty of a felony and, upon conviction thereof, shall be punnished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both: Provided, that any storing or holding by any farmer, gardener, or other person of the products of any farm, garden, or other land cultivated by him shall not be deemed to be a storing or holding within the meaning of this act: Provided further, that farmers and fruit growers, co-operative and other exchanges, or societies of a similar character shall not be included within the provisions of this section: . . .[12]

It has been pointed out that this exemption did not mean much as an enunciation of policy on the part of Congress, owing to the fact that it would have been a practical impossibility to enforce the provisions of the act against farmers or farmers' associations.[13] On the other hand, the country was

[12] 40 Stat. at Large 276.

[13] Even so, the exemption was held to be unconstitutional by two district courts (United States v. Armstrong et al., 265 Fed. 683 (1920) and United States v. Yount et al., 267 Fed. 861 (1920)). In the former it was ruled, "The second proviso . . . carves out an excepted class for which no reasonable basis can be seen . . . These persons are set apart as a favored class and are given the privilege of storing, acquiring, or destroying necessaries for the purpose of limiting the supply thereof to the public or affecting the marketing price thereof in interstate commerce without any restraint whatever, while all other persons who commit such acts

in the midst of a "food will win the war" campaign, and it was generally considered to be the part of wisdom to do nothing which either actually or psychologically would operate to interfere in any way with the complete freedom of agricultural effort. It is doubtless true also that the easy passage of this proviso reflected a rather friendly, or at least complacent, attitude toward such co-operative development as existed at the time. It should be borne in mind in this connection that the period of which we are speaking antedated the "commodity marketing" movement which shortly developed co-operative marketing on much more aggressive lines.

Similarly, various appropriation bills from 1914 forward, in setting aside certain funds for the use of the Attorney General to prosecute violators of the anti-trust laws, expressly stipulated that none of these funds should "be expended for the prosecution of producers of farm products and associations of farmers who co-operate and organize in an effort to and for the purpose to obtain a fair and reasonable price for their products." [14]

are to be punished as criminals. It is arbitrary legislation and cannot stand." Certainly it would constitute a more sweeping exemption of farmers as such, regardless of the character of their organization or activities, than the Federal Congress has elsewhere been willing to accept. Nevertheless, this section of the law was upheld by the Circuit Court of Appeals for the Second Circuit as a proper classification (C. A. Weed and Company v. Lockwood, 266 Fed. 785 (1920)). Compare Chapter XVI.

[14] 38 Stat. at Large, Part 1, 53. A similar provision in the appropriation bill of 1913 had been vetoed by President Taft as being evidently intended to prevent "the prosecution of combinations of producers of farm products for the purpose of

Here, as in the case of the Food Control Act, we have no mention of distinctive co-operative form, but we do have a clear shift to the issue of reasonableness as a test of the actions of the organization. The proviso, however, designed by the friends of co-operation as a means of preventing "persecution" by Federal district attorneys, would operate in practice as a deterrent upon the initiation of proceedings by the Department of Justice under any circumstances. For if as a result of the litigation it was decided that the activities of co-operatives resulted merely in securing a "fair and reasonable price for their products," then any sum expended by the Department of Justice in connection with the case would be an unauthorized expenditure. The effect of this legislation, therefore, was to put initial responsibility in this matter in the hands of the Federal Trade Commission. Should their investigations disclose unfair practices or restraints which were unreasonable, then upon their findings the Department of Justice might safely proceed. The situation, however, has been further affected by the passing of the Capper-Volstead law.

III. THE CAPPER-VOLSTEAD ACT

As early as 1919 organized efforts were made in Congress to pass a definite and separate statute covering the whole case of co-operative associations

artificially controlling prices." He characterized it as "class legislation of the most vicious sort," and referred to the Connelly case as presenting a similar situation.

with reference to the question of restraint of trade.[15] The Capper-Hersman bill of this session failed of passage but gave place to the Capper-Volstead bill, which became a law on February 18, 1922. In addition to the purpose mentioned above of having a specific and unequivocal statute covering the matter, it was further desired to supplement or broaden such exemptions as were conferred under Clause 6 of the Clayton Act. As Congressman Hersman said:

[15] "The history leading up to this legislation is interesting. Desire for a bill of this character began with the member associations comprising the National Milk Producers' Federation. The difficulties that these associations were having in various parts of the country where indictments have been brought against them charging violations of state anti-trust acts, threatened to undermine the progress of co-operative milk marketing. The leaders of the National Milk Producers' Federation brought the matter up before the National Board of Farm Organizations at a meeting in 1918. A committee was appointed by the National Board of Farm Organizations, . . . prepared a bill and had it introduced. . . . It was known as the Capper-Hersman bill and it granted a greater measure of exemption from federal anti-trust laws than is given in the bill which will become a law. This bill, introduced early in 1919, was referred by both senate and house to the committees on the judiciary. Notwithstanding the fact that it had the endorsement of most farm organizations then in existence and the later endorsement of officers of the American Farm Bureau Federation after it was formed, no efforts could induce a report.

"Meantime Senator Capper had introduced the identical bill in the senate and it was referred to the committee on agriculture. That committee was occupied with consideration of packer legislation and unable to give it consideration. The house thereupon acted upon the bill and the house bill on reaching the senate was referred to the committee on the judiciary. An extended series of hearings were held by this committee last summer with the result that the committee reported a substitute bill nullifying the purposes of the house bill. When the matter was finally threshed out, the senate by a vote of 56 to 5 reversed its position of a year ago and turned down one of its most important committees. This constituted one of the greatest victories ever won by farmers." Holman, Charles W., "How the Co-operative Fight Was Won," *The Iowa Homestead,* February 23, 1922.

"The Congress tried [in the Clayton Act] to help the farmer solve this problem, but they inadvertently used these words, 'not having capital stock.' Congress did not realize that it was as necessary for the farmer to have capital stock as it is for any other business in the world to have capital stock. No business can operate without capital, and I take it that unintentionally they tied the hands of the farmer in trying to aid him." A reading of the Congressional debates in connection with the passage of the Clayton Act must convince anyone (see Chapter III) that there was in the minds of the senators and representatives at that time a fairly clear recognition of the distinction between stock and non-stock associations, and that it was with the definite intention of preserving the non-profit character of the organization that they adopted the phraseology that they did.[16] In spite of this, however, it must be conceded that many persons in the co-operative movement itself desired to continue the capital-stock type of organization and to secure for it as great freedom of action as for those organized under the more extreme non-stock form. This philosophy of co-operation triumphed in the formulation of the Capper-Volstead Act.

In contrast to the Clayton Act, this measure laid less stress upon the recognition of a strictly defined

[16] Nevertheless there was a lingering feeling in certain quarters that the Clayton Act applied only to non-commercial organizations. The Capper-Volstead Act was therefore considered to be necessary to clarify this issue.

type of association which would be excluded from the operation of laws aimed primarily at abuses which had been found to be rather specifically characteristic of the profit-seeking corporation. To be sure, the Capper-Volstead Act is made to apply only to certain associations, but they present a very "loose construction" of co-operative doctrine. Associations coming within the operation of this act may be "corporate or otherwise, with or without capital stock, . . . *Provided, however,* That such associations are operating for the mutual benefit of the members thereof as such producers and conform to one or both of the following requirements: first, that no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein; or, second, that the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum."

But such associations are permitted to deal in the products of non-members to an amount equal to those handled for members. This provision weakens materially the non-profit character of associations formed under the law, particularly when taken with the fact that there is no restriction upon the rate of interest which can be paid, provided the rule of equal voting is followed. As a matter of practical expediency, it does appear to be important that co-operative associations should not be prevented from handling the product of non-mem-

bers under any and all circumstances. On the other hand, it would seem that permitting them to deal upon such terms as they might see fit in the product of outsiders reduces them to the level of a profit-sharing form of organization, and virtually destroys the force of any claim which they might make for special consideration on the basis of having a character distinct from that of the ordinary commercial corporation. It is the opinion of the writer that the situation could have been better met by the placing of a limit of say 10, 15, or even 20 per cent upon business which might be done with non-members.

But while the law is rather ambiguous as an expression of co-operative doctrine, it is unequivocally agricultural in its terms, being limited to "persons engaged in the production of agricultural products, as farmers, planters, ranchmen, dairymen, or fruit growers." Associations of such persons, if formed in accordance with its provisions, are removed from the original jurisdiction of the Department of Justice and placed, so far as matters of price determination are concerned, under the watch-care of the Department of Agriculture. Without conferring upon them complete immunity from any regulation by the Department of Justice or the Federal Trade Commission, it puts in the hands of a technically-informed and naturally sympathetic agency the initial determination as to whether their price-making activities have begun to run counter to public interest. This novel feature of the act provides:

That if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade to such an extent that the price of any agricultural products is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place, not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist therefrom. An association so complained of may at the time and place so fixed show cause why such order should not be entered. The evidence given on such a hearing shall be reduced to writing and made a part of the record therein. If upon such hearing the Secretary of Agriculture shall be of the opinion that such association monopolizes or restrains trade to such an extent that the price of any agricultural product is unduly enhanced thereby, he shall issue and cause to be served upon the association an order reciting the facts found by him, directing such association to cease and desist therefrom. On the request of such association, or if such association fails or neglects for thirty days to obey such order, the Secretary of Agriculture shall file in the district court in the judicial district in which such association has its principal place of business a certified copy of the order and of all the records in the proceeding, together with a petition asking that the order be enforced, and shall give notice to the Attorney General and to said association of such filing. Such district court shall thereupon have jurisdiction to enter a decree affirming, modifying, or setting aside said order or enter such other decree as the court may deem equitable. . . .

The facts found by the Secretary of Agriculture and recited or set forth in said order shall be prima facie evidence of such facts, but either party may adduce additional evidence. The Department of Justice shall have charge of the enforcement of such order. After the order is so filed in such district court and while pending

for review therein the court may issue a temporary writ of injunction forbidding such association from violating such order or any part thereof. The court may, upon conclusion of its hearing, enforce its decree by a permanent injunction or other appropriate remedy. . . .[17]

[17] 42 Stat. at Large 388. The Senate Committee on the Judiciary in reporting this bill (July 27, 1921) recommended the striking out of this section and substituting therefor a clause reading: "Nothing herein contained shall be deemed to authorize the creation of or attempt to create a monopoly, or to exempt any association organized hereunder from any proceedings instituted under the Act entitled 'An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' approved September 26, 1914, on account of unfair methods of competition in commerce." They argued that no monopoly was possible in the great staple products, such as cereals, livestock, and cotton, but it was possible in highly localized commodities, such as raisins and fluid milk, adding:

". . . Your committee sees no good reason why two, three, a half dozen, or a dozen co-operative associations might not properly be organized for the purpose of supplying a city with its milk, nor why, in the case of raisins, for instance, produced only within a limited area in the state of California, a monopolistic organization should be permitted and encouraged, rather than two or three co-operative associations organized and operating in similar lines.

"Section 2 of the House bill has for its purpose the alleviation of the evils of monopoly, or those that may follow from authorized combinations, by the granting of something like supervisory control to the Secretary of Agriculture. It was quite generally understood by the committee when the bill was before it at the last session that this section gave to the Secretary of Agriculture the authority to fix prices. The proponents of this bill, however, repudiate that idea and insist that it is not the proper construction of the bill, and assert that they are resolutely opposed to reposing such power in the Secretary of Agriculture. They assert that the bill gives to the Secretary power to declare that a price charged is unreasonable, but gives him no power to fix what is a reasonable price. . . . The experience of the Interstate Commerce Commission under a similar provision, giving it power to determine what is an unreasonable rate but no power to determine what is a reasonable rate, satisfies your committee that as this provision is construed by the proponents of the bill, and perhaps correctly, it is utterly valueless. If competition is preserved—that is to say, if no monopoly can exist under the act—regulatory provisions are superfluous."

This law apparently vests responsibility in the Secretary of Agriculture to protect co-operative associations from unwarranted prosecution on the charge of enhancing prices such as might be initiated for the purpose of harassing them and embarrassing their efforts to conduct business. On the other hand, it places upon him the responsibility for protecting the public against any unwarranted use of such power as they acquire by virtue of the right given them under this act, the Clayton Act, or state corporation laws to consolidate the operations of many producers in the hands of a single commercial agency.[18] There is nothing in this act, however, which prevents the Federal Trade Commission from taking cognizance of any actions on the part of co-operatives the same as those of any concern otherwise organized which they consider to constitute an unfair trade practice.

While no co-operative case involving either the Clayton Act or the Capper-Volstead Act has as yet been adjudicated by the Supreme Court of the

[18] "The Capper-Volstead Act . . . indicated bluntly that these co-operative associations could fix prices and might sometimes try to abuse that power. If so, a remedy was set forth under which complaint may be made and the Secretary of Agriculture may order the price reduced, and if the association fails to obey he may cause its dissolution. This is the only instance in our legislative history where any industry not public in character and not acting under a war crisis voluntarily suggested and accepted against itself the right of any governmental officer to control and curb its price-making power." Sapiro, Aaron, "The Law of Co-operative Marketing," *Kentucky Law Journal*, November, 1926, p. 6.

United States, it seems reasonably clear that the position of the co-operative as a legitimate form of business organization has been clearly established under the law and that so far as permissible practices are concerned they stand on the same footing as other business concerns, except that the Department of Agriculture has become a third regulatory agency entrusted with the responsibility of deciding what, in any given case, constitutes an undue enhancement of prices of agricultural products.

The debates in Congress while the bill was pending (*Cong. Rec.*, 67th Cong., 1st Sess., pp. 1042-1044, 2157-2164) indicate that the view was accepted that it would confer upon such farmers' organizations as conformed to its requirements immunity from Section 1 of the Sherman Act, declaring "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade" to be illegal. It was not intended, however, to confer immunity from Section 2 of the Sherman Act but to transfer to the Secretary of Agriculture the responsibility for determining whether prices were unduly enhanced by a combination of producers. This would leave with the Federal Trade Commission the power to act in cases of unfair trade practice and with the Department of Justice the power to move in cases not directly involving price enhancement but in which a co-operative so monopolized the market machinery as to deprive non-members of an outlet for their products or other restraints of trade not

involving the price question. Similarly, if a Capper-Volstead association enters into arrangements with non-co-operatives under which these non-member organizations acquire a voice in the naming of prices to be charged by the co-operatives or in which the co-operative dictates prices for products of non-co-operatives, it thereby places itself again under the jurisdiction of the Department of Justice.

In the Congressional debates, likewise, it was asserted that the whole measure was unconstitutional as class legislation. Since its passage, however, it has not been attacked on this ground and the fact that it was referred to in support of the validity of the Bingham co-operative law of Kentucky in the favorable opinion handed down by the Supreme Court of the United States (October term, 1927) creates a presumption that the court as now constituted would not, in case a test were made, declare the Capper-Volstead Act unconstitutional.

IV. MINOR DEVELOPMENTS

Since the passage of the Capper-Volstead Act a further step in clarifying the position of co-operatives has been taken by Congress in further defining practices which shall be recognized as legitimate. The Co-operative Marketing Act of 1926 clears up a certain twilight zone of joint action among co-operatives which the courts have been inclined more and more to concede to trade associations in the gen-

eral manufacturing or mercantile field, but which has not as yet been clearly covered in a general statute or amendment to existing anti-trust laws.

While the Co-operative Marketing Act of 1926 provides primarily for the expansion and strengthening of the educational and research work of the Department of Agriculture in connection with co-operative organizations, Section 5 gives a specific grant of power of a very important sort to co-operative associations. This reads as follows:

> Persons engaged as original producers of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit growers, acting together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and/or foreign commerce such products of persons so engaged, may acquire, exchange, interpret, and disseminate past, present, and prospective crop, market, statistical, economic, and other similar information by direct exchange between such persons, and/or such associations or federations thereof, and/or by and through a common agent created or selected by them.[19]

The two features of this act taken together show that Congress accepts the co-operative form of organization as a proper and helpful institution by which farmers may organize for carrying on their own business more economically and efficiently. It reflects the intention of giving them ample powers to develop such agencies effectively, relying, on the one hand, upon the counsel of a scientific bureau to

[19] 44 Stat. at Large 802.

direct their activities along wholesome lines and, on the other hand, upon the power of the courts (advised on technical economic questions by the Department of Agriculture or the Federal Trade Commission) to curb any possible abuse of the powers so granted.

There is one other respect in which Federal legislation touches the affairs of co-operative associations, and that is through our income tax laws. It has always been the contention of co-operators that their business is conducted on a non-profit basis and should therefore be exempt from the payment of income taxes. This point of view has been rather fully accepted by income tax officials and embodied in rulings which, however, very properly sought to define the character of non-profit business and to exempt only that which was conducted on a truly non-profit basis. Inasmuch as there had been a certain lack of uniformity among the rulings of various local officials, an effort was made by certain co-operatives in connection with the amendment of the income tax laws in 1926 to have the matter clarified and standardized as a clause of the income tax law itself. After considerable effort to harmonize the views of the co-operatives themselves and to explain their position to officials and legislators, the following clause was adopted:

Sec. 231. The following organizations shall be exempt from taxation under this title—(12) Farmers', fruit growers', or like associations organized and operated on a co-

operative basis (a) for the purpose of marketing the products of members or other producers, and turning back to them the proceeds of sales, less the necessary marketing expenses, on the basis of either the quantity or the value of the products furnished by them, or (b) for the purpose of purchasing supplies and equipment for the use of members or other persons, and turning over such supplies and equipment to them at actual cost, plus necessary expenses. Exemption shall not be denied any such association because it has capital stock, if the dividend rate of such stock is fixed at not to exceed the legal rate of interest in the state of incorporation or 8 per centum per annum, whichever is greater, on the value of the consideration for which the stock was issued, and if substantially all such stock (other than non-voting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the association, upon dissolution or otherwise, beyond the fixed dividends) is owned by producers who market their products or purchase their supplies and equipment through the association; nor shall exemption be denied any such association because there is accumulated and maintained by it a reserve required by state law or a reasonable reserve for any necessary purpose. Such an association may market the products of non-members in an amount the value of which does not exceed the value of the products marketed for members, and may purchase supplies and equipment for non-members in an amount the value of which does not exceed the value of the supplies and equipment purchased for members, provided the value of the purchases made for persons who are neither members nor producers does not exceed 15 per centum of the value of all its purchases.[20]

From time to time the proposal has been made for a statute providing for Federal incorporation of co-operative associations. It has not appeared,

[20] 44 Stat. at Large 9.

however, that, with the rapid strides that have been made in the enactment of state incorporation statutes, there is any very pronounced sentiment among co-operatives themselves for such a step. To an extent, probably, there is a desire in certain quarters for closer supervision of large-scale co-operative undertakings. This sentiment, however, has found its more recent and active expression in various bills introduced into Congress which would provide for Federal registration and would set up a national co-operative marketing board with supervisory and promotional functions.

The Williams bill introduced in the House of Representatives on January 24, 1924, (68th Congress, 1st Session, H.R. 6136) was the first and in some ways the most thoroughgoing measure of this sort. It sought to provide a "Federal co-operative marketing bureau" in the Department of Agriculture under the direction of a co-operative marketing board. It was to be the duty of this board to "lend aid in assisting producers of farm products in establishing economical and efficient systems and methods of distribution and marketing, in promoting more direct business relations through the organization of co-operative associations and societies," to gather and disseminate information as to stocks, estimated acreage, probable production, and estimated demand for farm products, "with the end in view that the American farmer through counsel thus given can so arrange his crop production as not to

produce a surplus of any certain farm product not readily subject to orderly marketing at fair return to the producer." It was proposed to divide the whole country into five "co-operative marketing districts" with a district manager in charge of each who should "promote, assist, and encourage . . . the organization and operation of co-operative marketing associations," render assistance to them in their transportation, selling, and management problems, require uniform accounting and full report of their operations, and arbitrate disputes between co-operative associations, producers, middlemen, and transportation agencies.

The whole idea of government initiative and supervision, however, has met a rather cool reception on the part of the majority of co-operatives, who lay much stress upon the "self-help" character of their organization and the old co-operative slogan that "co-operation to succeed must be born of necessity." In any event, legislation of this sort would have to do chiefly with the actual operation of particular co-operative organizations and would possess practically no significance for the question which we are discussing, namely, the status of co-operative forms and practices under the law.

CHAPTER XII

CASE LAW ON THE CONTROL OF MEMBERSHIP

Up to the present point in our discussion we have been dealing primarily with the question of statute law, making only incidental reference to an occasional judicial decision as it tended to create or reveal a situation calling for legislative remedy. We have been concerned in showing what recognition legislatures have thought it either wise or safe to give to the distinctive forms or practices that co-operatives have urged upon them as essential to the effective carrying out of their purposes. Such statutes have of course been subject to the review of the courts as to their constitutionality, and likewise such forms as the co-operatives have set up and such activities as they have engaged in have been the occasion of rather frequent litigation in which the courts are gradually establishing the interpretation of these statutes and the sort of co-operative organization and operation which will be permitted under these or other pertinent statutes. While the whole range of such adjudication covers a wide and rather miscellaneous field, the points of chief interest for our discussion may be grouped under three general head-

ings: (1) the control of membership; (2) equitable relief; and (3) collective action and restraint of trade. These are the topics to be dealt with in the following three chapters.

I. SELECTIVE MEMBERSHIP

One of the most distinctive features of co-operative organization is that it aims to create "a union of men,[1] not a union of capitals," as does the ordinary commercial corporation. Being "a union of men" for the achieving of a specific joint purpose, it has been a fundamental principle of co-operation that membership must be selective, drawing in those persons only who, because of their business connec-

[1] This has led to uniform voting or a rather rigid limitation upon any property basis which might be permitted. Since at common law a stockholder in a corporation has only one vote irrespective of the size of his shareholdings (7 R.C.L. 339; 244 Fed. 617, 619; 14 N.J. Law 222), and the ordinary corporate practices of voting by shares and of conferring voting power upon certain classes of stock and withholding it from others rest upon statutory bases, the "one-man-one-vote" principle incorporated in co-operative laws has not been particularly challenged. In certain cases, such as that of California, referred to in footnote 15, p. 40, the acceptance of this provision had, however, to await an amendment of the state constitution. In Illinois, a constitutional provision that "every stockholder shall have the right to vote for the number of shares of stock owned by him" still stands. As a result, the "one-man-one-vote" provision of the Co-operative Marketing Act passed in Illinois in 1923 had to be restricted to non-stock associations.

The other great tenet of Rochdale co-operation, the patronage dividend, was attacked in Mooney v. Farmers' Mercantile and Elevator Company (138 Minn. 199, 164 N.W. 804 (1917)) by a stockholder who claimed that earnings must be distributed uniformly according to the amount of stock held by each owner. The court ruled that this was not necessary in companies under the co-operative statute, although it was required in ordinary corporations.

tions and willingness to accept the control and discipline of the association [2] or, somewhat supplementing this, because of their personal qualities as a whole, would be the sort of material which could be fused together into a successful co-operative undertaking. This is, of course, the sort of relation which is readily conceded to incorporated bodies of religious, fraternal, or educational character. But in the commercial field the tendency of corporations offering capital stock to the investing public has been so strongly toward establishing the principle of free transferability as to create something of a difficulty for co-operative associations seeking to enforce a rule of selective membership.

In this connection an Iowa case [3] is of particular interest as accepting the general principle of free transferability of stock, but at the same time recognizing the special need of a co-operating group to protect itself from outsiders even when organized under the general corporation law in a state which had at the time no distinctive co-operative statute. In this case "the trial court, by written opinion filed, found that the plaintiff [who was seeking to compel

[2] As setting forth clearly this idea of the membership relation, a clause of the Oregon co-operative law of 1921 is of particular interest. It runs: "Membership in an association organized under this act shall be conditioned upon compliance with the rules, regulations and purposes of the association, and the signature of a person to the articles of association, the by-laws, the membership agreement or a member's marketing contract with the association shall be construed to mean that such person has accepted said rules, regulations and purposes. . . ."

[3] Funck v. Farmers' Elevator Company, 142 Ia. 621, 121 N.W. 53 (1909).

the transfer of stock on the books of the defendant farmer elevator company] was 'a malicious meddler,' and that he purchased his stock and sought membership in the defendant corporation for the purpose of betraying it to its competitors. The trial court, therefore, refused an order permitting him to examine the books of the company, but held that he was entitled to a transfer of his stock upon the books of the company as a matter of absolute right." On appeal, the Supreme Court reversed this decision. Some excerpts from this opinion are worth examining.

The defendant is a corporation for pecuniary profit, organized in the ordinary way. . . . The general plan of its promoters was that its stock should be owned and controlled by the resident farmers, to whom it looked for its patrons and customers. . . . It appears from the testimony with reasonable certainty that an organized system of "boycott" has been applied to the defendant for several years by so-called "regular" dealers. . . . it leaves no doubt in our minds but that the plaintiff was and is acting in behalf of the persons guilty of the boycott, and in furtherance of the conspiracy in which they are engaged against the defendant.

The question that confronts us is, Is he entitled to the aid of this court to any extent in carrying out the unholy purpose? It is undoubtedly true that the mere motive of the purchaser of corporation stock will not ordinarily be inquired into, nor be deemed material by the court in a proceeding to order the transfer of stock on the books of the company. Carson v. Iowa City Gas Company, 80 Iowa, 638. To our minds this case presents something more than the mere motive of the plaintiff. The evidence discloses an active conspiracy, which it

would be the duty of the court to enjoin if proper jurisdiction could be acquired. Can a court consistently enjoin and punish a conspiracy with one hand, and aid and abet it with the other? It is true that the plaintiff asks nothing in this case that is of itself illegal. If this transaction stood alone, the plaintiff would have the absolute right to the relief demanded, as held by the trial court. But must the court aid a conspiracy to its final goal simply because it travels this part of the way over a legal highway? We think not. In the light of the evidence the plaintiff does not stand before the court as a mere purchaser of stock in the defendant company, but as a conspirator, or a puppet of conspirators, working in conjunction with many others by unlawful means toward an unlawful end. . . . It is our conclusion, therefore, that the plaintiff is entitled to no aid from a court of equity, and that the relief prayed for should be refused.

While the decision not to compel transfer of the stock was based on the existence of a conspiracy against the company, it is interesting that the court definitely repudiated the view that the purchaser could demand such transfer "as a matter of absolute right," and furthermore that its decision took clearly into account the nature of the membership of the company ("resident farmers, to whom it looked for its patrons and customers"), its economic purposes, and the difficulties confronting it in the actual operation of the business.

Once such provisions as were covered in the by-laws of this Iowa elevator company, limiting the transferability of stock, were expressed in co-operative statutes, the courts have shown little hesitation in enforcing them. The Massachusetts law of 1866

provided that "no person shall be allowed to become a shareholder in such association except by the consent of the managers of the same." This sort of provision was carried along with the growth of the Rochdale system, and was definitely tested in the case of a Minnesota creamery association [4] organized under the Minnesota co-operative law of 1870. Here the court said:

> We do not see that R. L. 1905, 2863, has the effect of making a transfer of stock upon the books or the issuance of a new certificate compulsory when the law under which the corporation is organized makes necessary to such transfer the consent of the managers. This restrictive provision has always been and is today in the laws relating to co-operative associations, and clearly section 2863 was not intended to repeal such provision. A co-operative association was evidently considered a corporation of a local character, in which transfers of stock to strangers, perhaps nonresidents, might be undesirable. We have no doubt of the validity of such a restriction on the transfer of shares.

Here again the appropriateness and importance of restrictions upon membership as a safeguard to the co-operative type of business were taken into account by the court. This fact should not be lost sight of in spite of the major dependence which the court placed upon the specific provision embodied in the law of 1870. In other cases it has been adjudged proper even for non-co-operative companies to limit the transferability of the stock or require that they

[4] Healey et al. v. Steele Center Creamery Association, 115 Minn. 451, 133 N.W. 69 (1911).

have a period in which they might themselves purchase stockholdings or arrange for their transfer to persons who could be counted upon to promote the welfare of the corporation. In an Ohio case [5] the plaintiff argued that "the fact that the charter of a corporation or the general law under which it is formed expressly confers upon it or its directors power to regulate transfers of stock does not give unlimited power to refuse to recognize transfers. It merely gives the power to prescribe such regulations as may be reasonably necessary to protect the corporation." On this point the court found "the by-law here called in question [requiring that the corporation be allowed a period of 30 days during which it might find a purchaser acceptable to it] contains no suggestion of a purpose to prevent the alienation of stock nor to restrict it beyond reasons suggested by a consideration of the welfare of the corporation and the express provisions of the statute." [6]

This liberal view, further developed to cover the public policy enunciated by the legislature in

[5] Nicholson v. Franklin Brewing Company, 82 Ohio 94, 91 N.E. 991 (1910). This case involved a corporation organized under a Delaware statute which authorized the making of by-laws for the certification and transfer of its stock. In a Kansas case the opposite view was taken on the ground that the general corporation law of that state did not specifically authorize the making of by-laws limiting the transferability of stock, but that "the power to adopt by-laws regulating transfers is intended to promote convenience and certainty as to membership. It cannot be employed to embarrass transfer or curtail property rights."

[6] See also Farmers' Co-operative Mercantile Company of Scribner v. Schultz et al., 113 Neb. 801, 205 N.W. 288 (1925).

passing a particular statute, is made still more clear in the case of a farmers' elevator in North Dakota [7] organized under the co-operative law passed in that state in 1915 after the general pattern of the Nebraska law of 1911. The court set forth a clause of the statute declaring that "every co-operative corporation as such has power . . . fifth, to regulate and limit the right of stockholders to transfer their stock." Thereupon the decision says:

> Corporations are the creatures of statute. And the transfer of corporate stock is generally regarded as a legitimate subject of legislative regulation. . . . Co-operative corporations are formed and intended to operate upon different principles from general corporations. . . . Few things are more essential to the welfare of any organization than harmony. . . . In co-operative societies this is peculiarly so. They are formed for mutual benefit. . . . If stock in co-operative corporations could be sold and transferred the same as corporate stock in ordinary business corporations to any person whom the stockholder saw fit, then it would be possible for persons whose interests were antagonistic to the co-operative association to become members therein and thereby defeat the very purpose for which the corporation was formed. So it seems not only proper but necessary, in order that such corporations may continue and accomplish the purpose for which they were organized, to permit restrictions to be placed upon the right to transfer and own stock therein. . . . The by-law [8] . . . seems to be a reasonable

[7] Chaffee v. Farmers' Co-operative Elevator Company, 39 N.D. 585, 168 N.W. 616 (1918).

[8] Whatever limitations or restrictions the co-operative may desire to place upon membership or stockholding should be fully and clearly set forth in advance. The present Wisconsin law, after reciting a list of such permissible restrictions, provides

requirement to enable the corporation to exercise proper supervision over its membership so as to admit only such as are properly entitled to membership therein and to exclude therefrom those whose admittance would tend to create disturbances and threaten the very existence of the corporation itself.

All the cases cited thus far have related to capital stock co-operatives. In the case of non-stock laws that contain no provision with respect to the transferability of membership in the associations formed under them, the rule appears to be settled that a membership in them may not be transferred.[9] Of course, if the statute contains a provision on the point, this is controlling. Such provisions were inserted in the non-stock laws of California and Texas (pages 61 and 69) and in the Department bill, which was copied in several states. In the case of the "standard marketing act," [10] which provides for both stock and non-stock organizations, the question of restricting membership is covered by the following clause:

(a) Under the terms and conditions prescribed in the by-laws adopted by it, an association may admit as members, or issue common stock to, persons only engaged in the production of the agricultural products to be

"that no restriction upon the ownership or transfer of stock authorized by this section shall be valid unless provision setting out the terms of such restriction is contained in the articles of incorporation of the association and printed upon the stock subscription paper, if any, and upon the stock certificate."

[9] American Livestock Commission Company v. Chicago Livestock Exchange et al., 143 Ill. 210, 32 N.E. 274 (1892).

[10] See Appendix D.

handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent all or part of the crop raised on the leased premises.

This clause expresses the intention of admitting to active and voting membership only those persons who are actually interested in the production and sale of the commodity to be handled by the association. The other side of this idea is the intention, characteristic of the "commodity marketing" movement, to have the co-operative organization embrace all or as large as possible a number of the producers of the given commodity. More recently, however, the tendency has seemed to be away from this inclusive basis of membership and toward one of exclusive character, that is, limiting it to persons who, because of their financial independence, willingness to accept the direction of the association, or other personal qualities, will promote its welfare and the efficiency and success of its operations.

Several situations might arise under this newer practice which could readily result in litigation by an excluded producer seeking to secure admission to an association and thus testing the sort of exclusive practice which still seems more or less to be necessary to co-operative undertakings. An extreme case would be that arising if a single individual or small number of producers were refused membership in the marketing association which offered the

only outlet at the most convenient delivery or shipping point. This situation might be met by dealing with the producer on a non-member relationship. Even where this is done, however, it is not customary to permit the non-member to share fully in the advantages of the co-operative association—certainly not to give him any voice in its control. In proportion as co-operatives succeed and establish for their members a better distributive service and more satisfactory returns, the right to participate in these benefits is likely to be sought even by those who are suspected of being or have already proved themselves to be unsatisfactory from the standpoint of the existing membership or management.[11]

In the case of a number of associations in different parts of the country [12] the drift away from the "inclusive" theory of membership has been marked by the adoption of a rule that persons withdrawing voluntarily and in accordance with the terms of their contract may not be re-admitted for at least a period of one year and that those who have been expelled from the association shall not be permitted to re-enter for a longer time—frequently three years. If such measures with reference to membership do result in litigation, the issue will presumably be drawn on the question whether such rules are reasonably demanded by considerations of the welfare

[11] Certain other phases of the co-operative exclusive membership problem are discussed on p. 60.

[12] For example, the California Walnut Growers' Association, the National Pecan Growers' Exchange of Georgia, the Texas Farm Bureau Cotton Association.

of the association as a whole. Although the newer co-operative laws do not offer a clear statutory authorization for these disciplinary measures or for formal acceptance of members such as was set forth in the Minnesota and other Rochdale laws, precedent strongly indicates that efforts to force entrance into co-operative membership would not be successful.

II. CONTROL OF MEMBERS' PATRONAGE

We have just considered a phase of co-operative membership relations which has as its objective the keeping of persons out of the association. Co-operative experience on the whole, however, has probably been more concerned with keeping members in. In theory, the co-operative association does not go into the market place to compete with other companies for a share of the business, but represents the coming together of some selected group to set up a mutual agency for rendering a particular service in common. Instead of taking their chances of being able to make this a profitable venture, they desire rather to put the performance of a particular function upon a basis of assured efficiency and permanence.

Out of this situation have grown two particular practices which have been made the object of attack in the courts. The first is that of the by-law provision requiring members to pay a maintenance fee

—the so-called "maintenance clause"—and second the fully developed membership contract binding the member to exclusive dealing with or through the co-operative association for some more or less fixed period of time.

We have already pointed out that the maintenance clause rested upon the desire of a marketing group to keep an open channel through its local or even the primary terminal market to the centers where prices were competitively determined. It would seem that if properly presented to courts and carried out only by legitimate methods this purpose of maintaining an independent selling agency could meet with little opposition. Such a view now has the support of important legal opinion (see page 358) but, on the other hand, was rejected in Iowa (prior to the passage of co-operative laws in that state) and later in Colorado (see pp. 337 and 347). While these decisions were based primarily upon the alleged operation of the maintenance clause as a restraint of trade and will be dealt with in a subsequent chapter (XIV), it may be observed also that in these cases doubtless insufficient care was taken in the phrasing of such provisions or the presentation of the case to show that, as a contract arrangement between the member and the association, there was present in the agreement a degree of mutuality which would meet the views of most courts as to the elements of a valid contract.

This view of the matter was fully set out by an

Alabama court [13] in the case of a horticultural association organized under the non-stock law of 1909: [14]

Counsel insists that the declaration of incorporation expressly authorizes the company to collect a reasonable compensation from members for any service rendered; that the company has erected a warehouse and platform and other facilities at Foley, Alabama, for handling and disposing of the produce of its members, and had employes on hand to handle, assort, ship, and sell all kinds of produce for the market. Further, That petitioner purchased and kept on hand for use of its members fertilizers and such, necessary in planting and raising crops of all kinds, purchasing the same at wholesale, and furnishing the same to its members at wholesale prices. That the agent of the company daily received reports of the prices of produce in the various markets accessible to Foley, and furnished the same to its members whenever desired; and that in fact petitioner was actively engaged in rendering service to its members—resulting in mutual profit and advantage to each of them. That it was necessary to have a source of revenue to carry on the expenses of the corporation, and to this end adopted by-law numbered 9 of article 5, to the effect that all members of the corporation shall pay 3 per cent of their gross sales to the corporation for all produce handled by the corporation, and also section 8 for the payment of 3 per cent of the gross sales made to any person other than the authorized agent of the corporation. That in short, the corporation, for the services rendered, fixed a charge of 3 per cent upon the gross sales of the produce

[13] Ex parte Baldwin County Producers' Corporation, 203 Ala. 345, 83 So. 69 (1919). It is interesting to note that this court set forth specifically that its opinion was arrived at after careful consideration of the adverse ruling in the Decorah case.

[14] See pp. 65ff. The attempt had been made to show that the association was in fact incorporated under the general corporation law of the state rather than this co-operative statute, and that on those premises the service charge by-law was ultra vires.

of its members, whether sold through the corporation or not. . . .

The provisions of the act of 1909 clearly authorized the corporation to enact a by-law to secure from its members by assessment or dues, or otherwise, sufficient funds for the management of the business affairs of the concern; and we are fully persuaded the methods thus pursued were within the powers of the corporation.

Counsel further states the record shows that members were in fact encouraged in disposing of their produce to others if, by so doing, a better price could be obtained, and that no penalty was attached to any member for such sale, but merely a 3 per cent charge was fixed upon the gross sales whether to the corporation or outsider, as a proper amount to be paid by each member for the advantages obtained from the corporation for the services rendered.

New York courts [15] have taken an essentially similar stand, though with slightly different emphasis. Here a milk producers' association with a by-law requirement for the payment of $10 per year per cow for all milk delivered outside the association was upheld on the ground that "the incorporators of this association desired to engage in the business of shipping milk, and it was quite necessary that they be assured of the continued patronage of their members in order to justify the association in going to the expense of erecting a creamery."

In the main the maintenance clause by-law has now been superseded or supplemented by the use of separate formal contracts. In these, care is

[15] Bullville Milk Producers' Association v. Armstrong, 178 N. Y. S. 612 (1919). This opinion cited and followed Castorland Milk and Cheese Association v. Shantz, 179 N. Y. S. 131 (1919).

taken [16] to make clear the bi-lateral character of the arrangement and the obligations, activities, and financial outlays undertaken by the association on behalf of all the members whose entrance into the association and expected patronage give it the motive and assurance for embarking on the given undertaking. Acceptance of such a member contract as a natural, necessary, and wholly proper structural device for securing definite and reasonably permanent support of a commercial undertaking is set forth clearly and from a slightly different angle than the above citations in a California case: [17]

> The association was organized for the purpose of the better handling of citrus fruit through the co-operative and joint effort of its members. From the nature of the organization and the statement of its purposes as found in its articles and by-laws, it can be fairly and reasonably inferred that by the co-operation of its members mutual advantages would accrue to all through greater economy in handling and shipping and the securing of more advantageous marketing facilities. These results would be dependent directly upon the performance by the members of their agreement to deliver their fruit into the hands of the association for the purposes declared.

Together these cases enunciate an acceptance of the contract relation and the intention of courts to enforce it on three grounds: (1) that it is proper that a mutual association provide for the financing

[16] See model form prepared by the U. S. Department of Agriculture printed as Appendix G.

[17] Anaheim Citrus Fruit Association v. Yeoman, 51 Cal. App. 759, 197 P. 959 (1921).

of its current operations by the assessment of their cost upon the whole body of members, who themselves adopt this provision as one feature of their by-laws; (2) that an association making capital outlays for the erection of buildings or otherwise must make definite contract arrangement for the liquidation of such long-term obligations by equitable distribution of the burden over the membership who are to be benefited by such outlays and will be the owners of the property; and (3) that the purposes of the association in providing more efficient or more economical processing or marketing services can be realized only if mutually supported by a sufficiently large number of people on a sufficiently permanent basis.[18] In other words, the contract method of tying a commercial association together represents simply a special case which has arisen under general principles of commercial law and, being viewed by the courts from numerous angles under a variety of individual circumstances, seems to be accepted as *per se* a suitable and valid procedure.[19] Whether

[18] Compare pp. 326ff.

[19] "Agreements for exclusive dealing are valid except where such contract is part of a scheme by which it is sought to establish an unlawful monopoly. A contract to buy from or deal in the goods of one person has generally been held valid (see 3 Williston, Contracts, sec. 1645)." Ballantine, H. W., 8 Minn. Law Rev. 11.

"The marketing agreement is a proper means of achieving the purposes of the association; the purposes of the association are those recognized by the statute under which it was organized, and the attack on the agreement is really an attack on the statute." Kansas Wheat Growers' Association v. Charlet, 118 Kan. 765, 236 P. 657 (1925).

such a form, innocent in itself, may be used for improper purposes or operate in restraint of trade is a question that will come up for special consideration in a later chapter.

The argument in support of the contract between a member and his association is strengthened by the fact that the practice of making contracts for the delivery of agricultural products has long been prevalent as between private marketing or processing concerns and individual farmers. Conspicuous illustrations are canneries, pickling works, sugar factories, and produce wholesalers and shippers. We have already pointed out (page 183) that the earliest citrus co-operatives in California simply took over the practice of contracting fruit to the packing house and adapted this contract method of delivery to their own needs. It is to be presumed that, if only proper methods are used [20] in securing the signature of the grower to a contract with the co-operative association of which he is a member, the courts will not limit the freedom of a producer in entering into forward contracts for the disposal of his product. This view was vigorously expressed in the opinion of an Illinois circuit court (McHenry County, 1923) upholding such a contract in a milk producers' association:

> In determining whether the contract in question is a valid contract and how it may be enforced,—that is, whether the bill of complaint states a case entitling com-

[20] See p. 420.

plainant to equity, two cardinal and elementary principles should be borne in mind at the outset: First: That when sane men, intelligent and uninfluenced by fraud and undue influence, and there is no accident or mistake and no law violated, enter into solemn contracts and contracts under seal, it is and would be the policy of the law to enforce such contracts and agreements.[21]

[21] "A warning to business men that they are inviting trouble for themselves by permitting a small minority of their number to encourage the violation of co-operative marketing contracts is sounded in a statement by Walton Peteet, Secretary of the National Council of Farmers' Co-operative Marketing Associations.

"Dealers in farm products are said to have referred to producers' contracts as 'scraps of paper' in a certain Southern section. 'By questioning the integrity of contracts,' Peteet told them, 'you have placed a pry pole under the foundation of your own business which demagogues may seize at will and wreck your whole business. What you teach farmers about the sanctity or lack of sanctity of contracts will go with them into the jury box. Imagine yourself a litigant in court with your fortune dependent upon the enforcement of a contract, and suppose upon the jury were a number of farmers you had advised to violate their marketing contracts and several other farmers who had had their costs of marketing increased by the "welching" you had counseled. Can you imagine what thoughts would run through the minds of these jurymen as your lawyer pleaded in your behalf for the inviolability of *your* contract?

"'Farmers' co-operative marketing organizations are based on contracts, just as every other business is. Deny them the right of contract, or impair the validity of contracts, and you have destroyed co-operative marketing. For narrow and selfish reasons, very hard for me to understand, many merchants, bankers, and other business men have sought to deny farmers the same rights of contract they claim for themselves. Others have gone further and have openly and brazenly counseled and aided in the violation of these contracts in letter and spirit. These men are playing with dynamite.

"'If a farmer has not the right to contract with his fellow farmers to market his crops through a co-operative for five years, you haven't the right to rent a storehouse for five years. If by statute law you make farmers' marketing contracts cancellable at will, that same provision will go into all your contracts and that will be the end of contracts of organized business. If by precept and example you teach a farmer how to evade his solemn contract with others, his next step will be to violate his contract with you.

Second: That it is and has been the public policy of the state of Illinois to foster and encourage co-operation. This has been evidenced by the various acts of the General Assembly passed from time to time, one of which has just recently been given birth by the late General Assembly. The principle was recognized by our courts and legislature as far back as 1883.

Before leaving this question, however, a word might well be said concerning an early adverse decision in a grower's contract case[22] involving a violation which occurred in 1909. This was under a rather crudely drawn agreement promising the delivery of all the grower's peaches to the Georgia Fruit Exchange and the payment to it of 10 per cent of gross receipts as recompense for its services as distributer and 5 per cent on all sales made by the grower f.o.b. his local station or at the orchard. The court[23] characterized this agreement as unilateral and the 5 per cent payment as a penalty designed to force delivery and unreasonably to restrain trade, although the contract stated that this payment was made "in consideration of a protected market and consequent enhanced price." It also

"'You have a right to think as you please about co-operative marketing, and if you believe it is a bad thing for farmers you have a perfect right to advise them to stay out of co-operative organizations. But if they join and make a pledge or sign a contract to market their crop through their association, you violate the ethics of business and offend against the moral code if you counsel or aid the repudiation of pledge or contract.'" *Progressive Farmer*, December 5, 1925.

[22] Georgia Fruit Exchange v. Turnipseed, 9 Ala. App. 123, 62 So. 542 (1913).

[23] Court of Appeals. Subsequently the Supreme Court of Alabama took a very different position. See p. 357.

made very sweeping and unwarranted assumptions as to the nature of the transactions in question and quite ignored the fact that the exchange was put to the expense of maintaining a market service available for all members and that the grower who sold at home did so because of the real or expected increase in net returns, making such sales without brokerage fees or with fees lower than those charged at central markets. Inasmuch as better drawn contracts and better reasoned opinions have become prevalent since the time of the Turnipseed case, this opinion has now little more than historic significance, showing the change in the attitude of courts on exclusive dealing contracts.

III. LIQUIDATED DAMAGES

Since co-operatives, in common with other business concerns, desire to assure as far as possible the enforcement of their contracts, they are practically always drawn to include a provision for liquidated damages. Decisions on contract cases therefore almost inevitably emphasize this feature of the agreement and tend more and more to recognize it as a proper device for the control of the product of the members who have joined themselves together into a mutual marketing undertaking. The principle is well established that the party harmed by the breach of any valid contract should be awarded compensatory damages and that, on the other hand, no payment in the nature of a penalty

will be upheld. Just what constitutes strict compensation and what payment might have something of a punitive element is a question not easy to decide in many cases. Hence it has long been commercial practice to agree in advance upon some sum which both parties were willing to accept as a reasonable payment to be made as "liquidated damages" in the event of a breach of the contract.

The practice of stipulating liquidated damages was early taken over by the California co-operatives, and has since been adopted in all parts of the country. The mere fact, however, that a certain sum has thus been agreed upon in advance does not preclude the courts from declaring it to be a penalty if it can be shown to their satisfaction that the amount is unreasonable and therefore in fact a penalty. The issues were rather fully set forth in an opinion handed down in a California co-operative case [24] in 1921 as follows:

[1] Aside from any provisions of statute, it has long been held under decisions having their basis in the common law that a contract is not enforceable where a sum of money as a penalty is provided to be paid in the event of a breach, and where the sum fixed has no reference to, and finds no support in, the amount of actual damage sustained by the complaining party. Anson on Contracts, par. 347. The effort of the law has always been to work the equitable result that for the breach of a simple contract obligation there shall be cast upon the delinquent party a liability to respond to such damages

[24] Anaheim Citrus Fruit Association v. Yeoman, 51 Cal. App. 759, 197 P. 959 (1921). See also recent Oklahoma cases, p. 364.

only as will furnish reasonable compensation for the injury done. Hence it has been held that a penalty, so stated to be and answering to its definition strictly, is never recoverable, but that the party shall be remitted to his remedy for compensatory relief. It has also been held nevertheless that an agreement fixing the amount of damages for the breach of a contract in advance, where such amount could be shown to be reasonably proportionate to the actual damages sustained, or where, because of the peculiar nature of the contract, it would be extremely difficult to ascertain the amount in which the innocent party has suffered damage, is allowed to be enforced. Sedgwick on Damages, vol. 1, par. 403, et seq. Our Civil Code (sections 1670 and 1671) has narrowed the rule by not allowing the enforcement of a condition fixing damages in advance except "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage;" hence we have only to inquire in this case as to whether the contract was, in its terms and conditions, and as shown by surrounding circumstances, such as to fall within the denominated class.

. . . Defendant sought to show at the trial that the damage which would accrue to the association by reason of any of its members failing or refusing to market their fruit through the association could be easily and exactly ascertained, and that such damage would consist wholly of a proportionate amount of overhead operating cost. By the line of questioning pursued it was made clear that the association would suffer an actual monetary loss by reason of the failure of defendant to deliver his fruit at the association packing house for market, as he had agreed to do, but in the very nature of the case we do not think that such damage should be the only damage considered to have been suffered by the plaintiff. Other elements have already been suggested. The existence and life of the association itself depended upon its being furnished fruit to dispose of in the public market. A reduction in the amount of fruit so handled would not only tend to increase the overhead cost to the non-trans-

gressing members, but, as we may assume, to some extent affect the prestige and standing of the association as a marketing concern. The argument would be the same, regardless of the quantity of fruit which might have been delivered by the defendant, whether it composed but a small fractional part or one half or more of the entire production designed to be marketed by the plaintiff agency. Enough has been said, we think, to show that the case falls within the class as to which the law permits damages to be liquidated by contract in advance of their occurrence. It follows as a necessary conclusion that plaintiff was entitled to recover the exact amount fixed in its contract as the sum per box which defendant should pay by reason of his failure to market this fruit in the manner agreed.

Recent co-operative contracts in the United States have sought to put their case in the most favorable terms by employing some such phraseology as the following:

Inasmuch as the remedy at law would be inadequate, and inasmuch as it is now and ever will be impracticable and extremely difficult to determine the actual damage resulting to the Association should the Grower fail so to sell and deliver all of his tobacco [or whatever], the Grower hereby agrees to pay to the Association for all tobacco delivered, consigned or marketed or withheld by or for him, other than in accordance with the terms hereof, the sum of five cents [or other amount] per pound as liquidated damages, averaged for all types and grades of tobacco, for the breach of this contract; all parties agreeing that this contract is one of a series dependent for its true value upon the adherence of each and all of the growers to each and all of the said contracts.[25]

[25] [Tri-State] Tobacco Growers' Co-operative Association Marketing Agreement.

Further, both the Department bill of 1917 and the large number of acts passed in greater or less conformity with the "standard marketing act" during the past few years have sought to strengthen the co-operatives' position still further by including a declaration that public policy as enunciated by the legislature favored the liquidated damages provision. The clause of the Kentucky Act of 1922 reads as follows:

> The by-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees, in case any action is brought upon the contract by the association; [26] and any such provisions shall be valid and enforceable in the courts of this State; and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties.

Where a payment is agreed upon in advance as liquidated damages in a contract drawn in these terms under a statute explicitly declaring the public policy of the state with reference to such payments, it is almost certain to have the approval of the court. Some judges have specifically washed their hands of responsibility to inquire into the actual

[26] The provision as to costs is the distinctively new feature of the section, adding to the rights an injured party already had under the general law existing as a result of a long line of court decisions.

amount of the damages stipulated in such contracts, "it being the duty of the court always, where the damages are uncertain and have been liquidated by an agreement, to enforce the contract." [27] In view of the stress laid upon the imponderable benefits derived from co-operative marketing, the determination of fact would at best be rather difficult and inconclusive. Possibly the circumstance that so few

[27] Sun Printing and Publishing Association v. Moore, 183 U.S. 642 (1902). In Minnesota Co-operative Wheat Growers' Marketing Association v. Huggins (162 Minn. 471, 203 N. W. 420 (1925)) the court said in reply to the claim that a payment of 25 cents per bushel constituted a penalty rather than liquidated damages: "We cannot say that 25 cents per bushel is unjust or oppressive or out of all proportion to the damages which would result from a breach of the contract. We must therefore construe the amount as liquidated damages rather than a penalty." This same amount has been upheld by several other states in cases involving the various wheat pools, although it is a much heavier charge than that taken under the old "maintenance clause" agreements. Similarly, liquidated damages of 5 cents per pound and even 10 cents per pound have been upheld in cases involving the cotton pools. The 10 cent payment was upheld by a Mississippi court (Brown v. Staple Cotton Co-operative Association, 132 Miss. 859, 96 So. 849 (1923)), saying: "It is a matter of common knowledge that staple cotton has fluctuated during one season as much as 10 cents per pound." This would amount to 50 per cent of the value of the product even with cotton at 20 cents a pound, and would be proportionately much higher than a rate of even 25 cents a bushel on wheat. In view of the extreme fluctuation of many agricultural prices it is a question whether a flat rate is as advisable as a percentage charge. In a relatively old case (Burley Tobacco Society v. Gillaspy, 51 Ind. App. 583, 100 N.E. 89 (1912)) liquidated damages were set at 20 per cent of the value of the product, and this was upheld as not constituting a penalty. In Wisconsin the co-operative law of 1921 defined liquidated damages as an agreed sum not in excess of 20 per cent of the value of the product. In 1925 this figure was raised to 30 per cent, thus allowing any association to collect stipulated damages up to that amount without any necessity of proving the amount of real damages or the reasonableness of the sum stipulated so long as it is within the 30 per cent limit.

of the many co-operative contracts have been attacked upon this ground is evidence that the strength of the position now attained by this arrangement is rather generally conceded.[28]

Finally, it would appear that special interest, if

[28] However, some judges and some attorneys still would put a stricter interpretation upon this matter (see Mitchell, J. G., 9 Iowa L. Bull. 6). The writer of this article contends that "there is no support whatever for the suggestion that the courts of New York will undertake to enforce penalties, regardless of their amount, simply because they have been otherwise designated, or that they will differentiate in the enforcement of agreements made by co-operatives and their members and any other parties."

The Supreme Court of Oklahoma in Oklahoma Cotton Growers' Association v. Salyer (114 Okl. 77, 243 P. 232 (1925)) found that the co-operative law of 1917 did not support a charge of $5 per hundredweight on cotton sold outside the association, saying: "Said sec. 13 of the Act provides also that said by-laws may fix an amount as liquidated damages for breach of contract, but it prescribes a condition and basis upon which such liquidated damages shall be fixed, viz: 'That such damages shall be reasonable sums, in amount fairly related to the actual damages ordinarily suffered in like circumstances.' The agreement violates this statute, takes away this statutory right by providing a fixed, arbitrary, unconditional lump sum of $5 per hundredweight for all cotton sold to parties other than the association, without reference to the reasonableness of such damages, without provision for determining whether they are reasonable or whether they are fairly related to the actual damages sustained, or fairly related to the actual damages ordinarily suffered in like circumstances."

While it is apparent that this court belongs to the school of strict constructionists in the matter of liquidated damages, it is interesting to observe that the statute in question is modeled on the Department bill of 1917, whereas Oklahoma in 1923 passed a law of the "standard" type, whose liquidated damage clause reads as follows: "The by-law or the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products . . . and any such provision shall be valid and enforceable in the courts of this state; and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties." This clause in the new law has not yet been passed on by the Supreme Court of the state.

not importance, attaches to a recent decision in Iowa enforcing the payment of liquidated damages under an exclusive dealing contract. Since earlier decisions in that state (160 Ia. 194 and 164 Ia. 197) had declared the somewhat analogous though distinct and milder maintenance provision [29] void, the rule laid down in Clear Lake Co-operative Livestock Shippers' Association v. Weir (200 Ia. 1293, 206 N.W. 297 (1925)) goes far toward removing any question which might still be lingering as to the recognition of the right of co-operative associations to control the product of their members through contracts. The Clear Lake Shippers' Association opinion does not even find it necessary to question directly the validity of liquidated damages under the Iowa co-operative law of 1921 but, finding that law to be constitutional and not in restraint of trade and finding no merit in certain technical objections to the contract, orders the enforcement of the contract.[30] Whether this view would also govern in the

[29] This is a distinction which the close student of co-operative thought and practice finds sadly lacking in judicial opinions, in the argument of counsel, and even in the discussion of commentators. The maintenance payment, as such, was an assessment of operating costs or capital contributions rather than damages at all, unless that term be used in the most extreme "compensatory" sense. As properly applied the charge was the same, or even less, for those who elected to market outside than for those who sold through the association.

[30] This decision of course rests also upon the collective bargaining law of 1921, which provides that "contracts and agreements entered into between associations and the members thereof may, where damages that may be sustained for the breach thereof are difficult of ascertainment, provide for such penalties as may be agreed upon, which penalties, if the parties thereto so agree,

case of a liquidated damages contract of an association organized under the Iowa Rochdale law of 1915 remains to be seen, but there would at least be ample precedent from other states for such a course. The Decorah Farmers' Co-operative Society and Farmers' Mutual Co-operative Company decisions both antedated the Iowa law of 1915. Colorado is the one state which definitely followed the Iowa lead in two cases,[31] both decided after the passage of a co-operative law of the Rochdale type, but prior to the (more or less) "standard marketing act" of 1923. Subsequently the Colorado Supreme Court has enforced liquidated damage contracts in a case [32] involving an association formed under that law. Thus liquidated damages seem to be unanimously upheld in all cases as yet adjudicated under a type of co-operative law now available in at least 40 states of the Union.[33]

shall be construed as liquidated damages and be enforceable in the full amount thereof both at law and in equity."

[31] Burns v. Wray Farmers' Grain Company, 65 Colo. 425, 176 P. 487 (1918); Atkinson et al. v. Colorado Wheat Growers' Association, 77 Colo. 559, 238 P. 1117 (1925). See also Colorado Wheat Growers' Association v. Thede, — Colo. —, 235 P. 30.

[32] "The [Co-operative Marketing] Act of 1923 changes the public policy of this state." Rifle Potato Growers' Co-operative Association v. Smith, 78 Colo. 171, 240 P. 937 (1925).

[33] See California Canning Peach Growers v. Downey et al., (Cal. App.) 243 P. 679 (1925)—50 per cent of market price; Dark Tobacco Growers' Co-operative Association v. Robertson, (Ind. App.) 150 N.E. 106 (1926)—5 cents per pound; California Bean Growers' Association v. Rindge Land and Nav. Co., (Cal. App.) 248 P. 658 (1926)—one cent per pound; South Carolina Cotton Growers' Co-operative Association v. English, 135 S. C. 19, 133 S.E. 542 (1926)—5 cents per pound; Potter v. Dark Tobacco Growers' Co-operative Association, 201 Ky. 441, 257 S.W. 33 (1923)—5 cents per pound; Dark Tobacco Growers Co-operative

Association v. Mason, 150 Tenn. 228, 263 S.W. 60 (1924)—5 cents per pound; Poultry Producers of Central California v. Nilsson, (Cal. Sup.) 239 P. 1086 (1925)—5 cents per dozen; Kansas Wheat Growers' Association v. Schulte, 113 Kan. 672, 216 P. 311 (1923) —25 cents per bushel; Main v. Texas Farm Bureau Cotton Association, (Tex. Civ. App.) 271 S.W. 178 (1925)—5 cents per pound.

CHAPTER XIII

THE COURTS' ATTITUDE ON EQUITABLE RELIEF

The remedy of liquidated damages, even if it be fully accepted by the courts and enforced in all cases, is inadequate to meet the needs of present-day co-operative marketing organizations. This is owing to the fact that the movement has now, to a considerable extent, passed from the local to the regional or "commodity" phase, and from emphasis upon the shipping function, that is, efficient and economical distribution, to emphasis upon the strategy of selling and direct influence upon the price level.

Whereas the local shipping association might be fully compensated by the payment of a "maintenance charge" or by "liquidated damages" in an amount no larger than the regular service charge, the centralized or federated "commodity marketing" system finds actual delivery of the product absolutely essential to the carrying out of its program of "orderly marketing," and liquidated damages cannot be set at a figure high enough and collected with sufficient certainty and swiftness to assure such delivery in all cases. At times a member might find

it individually profitable to pay liquidated damages and sell his product outside at a moment when prices were at the peak or when buyers were willing to quote an excessive price for the sake of breaking down the co-operative organization. But if one might do this, all might seek their immediate and individual advantage in the same way, and any collective purpose of the association would be foredoomed to defeat.

Co-operatives therefore turned to the equitable remedies of injunction and specific performance. Of course these remedies have from the first been available to co-operatives on the same basis as to other contracting parties. But how effective they would prove in actual practice would depend upon the attitude of particular courts in particular instances. To await the outcome of events in this matter seemed to co-operative leaders to leave them very inadequately protected. Hence, as has been pointed out, vigorous efforts have during recent years been directed toward having the enabling acts declare in advance that every aid of the courts should be given to securing the actual carrying out of co-operative member contracts. The Kentucky pooling law of 1906 was amended in 1908 to prescribe injunctive relief against contract breakers but made no mention of specific performance. The Department bill of 1917 carefully covered the question of liquidated damages but made no mention of either injunctions or specific performance, although

clauses covering both had already come into use in contracts of some of the California co-operatives. A few years later, when the "standard marketing act" began its career of rapid adoption by states in all parts of the Union, it contained a clause following the one on liquidated damages which read as follows:

> In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof. Pending the adjudication of such an action and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member.

Whether or not the law of a given state includes the above provision, co-operative contracts which follow the recent pattern commonly cover the matter with a provision like the following:

> The Grower agrees that in event of a breach by him of any material provision hereof, particularly as to delivery or marketing of any wheat other than to or through the Association, the Association shall, upon proper action instituted by it, be entitled to an injunction to prevent further breach thereof, and a decree for specific performance hereof, according to the terms of this agreement; and the Association and the Grower expressly agree that this agreement is not a contract for personal services or demanding exceptional capacity or talents; and that this is a contract for the purchase and sale of personal property under special circumstances and conditions and that the buyer cannot go into the open markets and buy wheat

to replace any which the Grower may fail to deliver; and that this contract will be the proper subject for the remedy of specific performance in the event of a breach thereof.

What course has been pursued by the courts in the light of such contractual agreements and the statutory expressions of legislative bodies will now be examined.

I. SPECIFIC PERFORMANCE

Obviously what the co-operatives desire is to secure the actual carrying out of every membership contract in strict accordance with its terms. The issuing of decrees of specific performance as a means of achieving this end has not, however, been a proceeding that commends itself very widely to courts of equity in the absence of definite statutory authorization. Three general issues have arisen where cases involving specific performance have come to adjudication. First, it has been argued that the fulfillment of these marketing contracts involves matters which cannot properly or adequately be handled by the court. Second, the contract is sometimes attacked on the ground that it lacks mutuality of remedies. In the third place, it is maintained that there are adequate remedies at law.

In general, courts of equity will not specifically enforce contracts for the performance of personal service, lest they assume the position of demanding

involuntary labor or servitude. However, the fulfillment of a marketing contract does not require the signer to produce anything or to expend personal effort or skill. It merely requires that he deliver such goods as he may elect to produce, and this work can easily be delegated to servants if he shuns the task himself. On the other hand, the carrying out of most marketing contracts involves not a single act, but a continuous series extending over a period of months or years, and courts might well argue that it is not practicable to grant decrees for specific performance in cases involving large memberships scattered over a large territory and continuous acts extending over long periods of time. For such undertakings the court could not furnish adequate supervision to insure that its orders would be properly carried out.

On this point the New Hampshire Supreme Court [1] endorsed the opinion of the trial court denying a decree of specific performance "for the sufficient reason that it would be a cumbersome and expensive process and could be accomplished only by placing the defendant's milk producing operations in charge of the officers of the court."

Much the same view was evidently entertained by the Washington Supreme Court when in its

[1] Manchester Dairy System, Inc., v. Henry M. Hayward, — N. H. —, 132 A. 12 (1926). "In this case I agreed to waive the prayer for specific performance. I believe the trial court was wrong in its reason but right in its conclusion that specific performance should not be granted." Reuben Hall, Counsel, New England Milk Producers' Association.

decision on an injunction case (Washington Cranberry Growers v. Moore, see page 310) it referred in passing to "the fact that the contract is one which could not be specifically enforced in a court of equity by reason of the fact that it would require the performance of continuous duties." On the other hand, the neighboring state of Oregon decreed specific performance [2] of contracts to deliver hops by producers under a five-year agreement with a local dealer, saying:

> We are not to be understood as holding that the defendant may be required to perform the labor or carry on the project of producing the crops, but after they have been produced, and the plaintiffs have contributed to their production as required by the terms of the agreement, or have at all times been ready and willing to do so, and have only been deterred therefrom by the acts of Johnston, they are entitled to have specific performance in delivery of the amount of the crop so agreed to be delivered.

The Supreme Court of this state likewise decreed specific performance in subsequent cases involving co-operative contracts,[3] and the same

[2] See Livesley v. Johnson, 45 Ore. 30, 76 P. 946 (1904); Livesley et al. v. Heise et al., 45 Ore. 36, 76 P. 952 (1904).

[3] Oregon Growers' Co-operative Association v. Lentz, 107 Ore. 561, 212 P. 811 (1923). "While it is not within the power of litigants to invest a court with any jurisdiction or powers not conferred on it by law, and if the court is without jurisdiction of the cause of suit or subject matter involved in a particular case, such jurisdiction cannot be conferred by consent, agreement, or waiver, yet the legal principle was not applicable because the trial court had full and complete jurisdiction of the subject matter involved and of the parties to the suit independently of any provision of the contract. . . . The relief granted would have

course has been followed in South Carolina,[4] Mississippi,[5] Georgia,[6] Texas,[7] Alabama,[8] and Colo-

been proper if the provisions referred to had not been incorporated into the contract. . . . The obligation of the contract was not that the defendant should grow loganberries upon his land, nor that he should sell the same when grown to the plaintiff, but that if he did grow loganberries and did sell them, then he was obligated to sell them to the plaintiff and to no one else."

Oregon Growers' Co-operative Association v. Riddle, 116 Ore. 562, 241 P. 1011 (1926), follows Lentz case. Emphatic in disposing of the contention that the contract lacked mutuality of remedies, even though "the grower could not have specific performance against the association because the duties rested upon the association were in the nature of personal services and therefore it was inequitable to grant specific performance at the suit of the association."

[4] South Carolina Cotton Growers' Co-operative Association v. English, 135 S. C. 19, 133 S.E. 542 (1926).

[5] Brown v. Staple Cotton Co-operative Association, 132 Miss. 859, 96 So. 849 (1923). "Appellant contends that appellee must fail in this cause because there is no mutuality of remedy by the parties; that appellee is not entitled to the remedies of specific performance, injunction, and liquidated damages for a breach of the contract in question by appellant because appellant would not under the law be entitled to like remedies in case of a breach of said contract by appellee. Without going into the question of how the law stood on this subject in its application to the case at bar prior to the adoption of the Co-operative Marketing Act, we find that by that act the exact remedy here adopted by appellee is provided for. . . . It is true that said Co-operative Marketing Act having been adopted after the contract here considered was entered into does not and could not undertake to control the substantive rights of the parties to this cause. It is not true, however, that the remedies therein provided are not applicable to past as well as future transactions."

[6] Harrell v. Cane Growers' Co-operative Association, 160 Ga. 30, 126 S.E. 531 (1925).

[7] Texas Farm Bureau Cotton Association v. Stovall, 113 Tex. 273, 253 S.W. 1101 (1923). "It is clear that this type of contract was expressly authorized by the Co-operative Marketing Act. Since the statute itself authorizes the courts to enforce specific performance of this character of contract, and issue injunctions to prevent breaches thereof, it is not competent for courts, except upon grounds which admit of no reasonable doubt, to conclude that such a contract is too uncertain and indefinite as to price to be enforceable by the remedies prescribed . . . Whatever may be

rado.[9] In most, if not all, of these states considerable weight has been given to the enforcement clauses

the rule in equity, the statute will control. [Cases cited.] Aside from the statute, the plaintiff in error, because of the contract and the nature of its business as a co-operative concern without capital stock, would be entitled to equitable relief. . . . There is no lack of mutuality of remedies, for the reason that, in the event of a breach of the contract by the association, defendant in error would be entitled to relief in equity. The Court of Civil Appeals expresses the view that specific performance could not be awarded against a member, because it would necessarily require constant supervision of the court covering a long period of time, involving a series of acts, and because the court would be confronted with the possible problem of pursuing the party against whom the plea is made from place to place, etc. The answer to this is that the rule stated is a rule of decision, and not a limitation of the jurisdiction of a court of equity. In addition, the statute has authorized the remedy, and the contract here involved is within the statute, which must control. . . . Besides, a court of equity would not meet with any very serious difficulty in requiring the average owner to deliver his cotton after it was ginned."

Also Hollingsworth et al. v. Texas Hay Association, (Tex. Civ. App.) 246 S.W. 1068 (1922).

[8] Warren v. Alabama Farm Bureau Cotton Association, 213 Ala. 161, 104 So. 264 (1925). "It may be conceded, for the argument merely, that the character and terms of this contract, and the extent and duration of its mutual obligations, would ordinarily deter a court of equity from undertaking the specific enforcement of its several requirements by direct affirmative action. [Cases cited.] The statute in this case gives the remedy by injunction to prevent threatened breaches of the contract by association members in the disposition of their cotton, and by their contract they have expressly assented thereto. We can see no practical difficulty in the specific enforcement of this single feature of the contract for a single season; and the objection based upon the want of mutuality of remedy, and the adequacy of the remedy at law, are eliminated by the terms of the statute and the contract made thereunder. The undertakings and operations of the association and of its members are clear and certain, and the remedies in question can be easily applied."

[9] Rifle Potato Growers' Co-operative Association v. Smith, 78 Colo. 171, 240 P. 937 (1925). "The legislature has as complete power over the rules of equity as it has over those of law. So of the provision for specific performance; it is a rule of equity that specific performance will not be granted in favor of one party

of recent co-operative statutes. This view, however, has not been so readily accepted in California, where attempts to secure such relief have met with difficulties growing out of state statutes,[10] and where the courts tenaciously adhered to the doctrine that contracts of this character involve personal service and are lacking in the necessary mutuality of remedies. In 1922 the California Supreme Court refused [11] to decree specific performance, saying:

> Were it not for the doctrine of mutuality of remedy as a prerequisite to the equitable relief here demanded, there would seem to be no good reason for denying respondent the more adequate relief that would be thus afforded to marketing corporations such as this, which are more or less dependent for their efficient maintenance and operation on ability to specifically enforce the mutual obligations of their members.
>
> . . . The doctrine is elementary and impregnably fortified by authority that a contract cannot be specifically enforced unless this remedy is available to both parties. Equity will not enforce a specific performance of a contract when the party asking its enforcement cannot, from the nature of the obligation assumed, be compelled to per-

unless it could have been granted in favor of the other. But that is a rule made by the courts which the legislature has a right to change; and, moreover, as we have shown above, there is mutuality in this contract since it is a contract among the members and injunction and specific performance are to be enforced against any member who violates it in favor of all those who do not."

[10] California Civil Code, Secs. 3390 and 3423. The California situation was carefully considered by Mr. Stanley Arndt in 1920 (8 Cal. Law. Rev. 281). Subsequent co-operative legislation in that state and cases bearing on the issue are discussed on page 308.

[11] Poultry Producers of Southern California v. Barlow, 189 Cal. 278, 208 P. 93 (1922).

"The rule of mutuality of remedy is almost demolished with exceptions and in some states has been abandoned altogether." 4 Neb. Law. Bull. 363.

form on his part. While there is, perhaps, nothing in the obligation assumed by the defendant under the contract in question which binds him to sell and deliver to plaintiff all the eggs produced from his poultry during a given period of time that could not be specifically enforced if it were a simple sale for cash to be paid on delivery, a different condition is presented when the reciprocal obligation of the plaintiff calls for a future performance, and consists of the exercise of personal skill, diligence, and discretion in finding the best market for the eggs, selling them for a suitable price, and paying to the defendant a certain percentage of the proceeds, and where the transaction is to be repeated at frequent intervals throughout a number of years. So far as this marketing contract is concerned, it is, on the part of the plaintiff, a contract of agency calling for services of the corporation of a highly personal nature, requiring the exercise of skill and discretion, and covering repeated transactions to extend over a number of years. It has not been the practice of courts of equity to attempt to enforce such complicated personal obligations, or to burden themselves with the supervision of frequently recurring duties of contracting parties.

A definite attempt to change this situation was made in the passage of the Co-operative Marketing Act of 1923 including the ordinary injunction and specific performance provisions. "Furthermore, in 1925 the legislature adopted certain code amendments (Secs. 3397 and 3423) which confer the right to the remedies of specific performance and injunction upon all non-profit co-operative associations, whether or not they have been organized under the Co-operative Marketing Act or have adopted its provisions." [12] The effect of these several pieces of

[12] Meyer, T. R., 15 Cal. Law Rev. 102. See also Poultry Pro-

legislation has not yet been determined by any Supreme Court decision. However, the view that they clear the path for equitable relief in California has been taken by certain lower courts. For example, the Superior Court of Sonoma County early in 1925 decreed specific performance of a contract with the California Prune and Apricot Growers' Association, saying in this connection: "There seems to be a growing tendency of our courts and the legislatures of several states to protect farm marketing associations on the ground of what has been termed 'public welfare,' in the interest of uniform, economical, and efficient marketing of products of the soil, to avoid speculation in food products so far as possible. This may account for what may appear to be a liberal construction and classification." The court further called attention to the fact that cases were then pending in the Supreme Court of the state in which the constitutionality of the provision of the statute covering equitable relief was involved.

Thus far no such case has been decided, but on October 1, 1925, the Supreme Court of California ruled that the lower court had erred in ordering specific performance in the case [13] of an association formed prior to the passage of the present marketing law. On the presentation of the case, both parties agreed that the decision in the Barlow case

ducers of Central California v. Murphy, 64 Cal. App. 450, 221 P. 962 (1923).

[13] Poultry Producers of Central California v. Nilsson, (Cal. Sup.) 239 P. 1086 (1925).

(see above), which had been handed down after the favorable decision of the lower court in this case, was controlling. Since the cases referred to by the Sonoma County court have been disposed of without coming to a Supreme Court decision, and since the several co-operative contract cases decided by that court during 1926 have none of them sought to secure specific performance or injunction, it still remains a question whether this form of equitable relief will be granted in California. The equitable relief clause of the marketing act of 1923 was on November 16, 1923, declared unconstitutional by the Circuit Court of Santa Clara County and this decision has not been appealed.[14]

[14] "On the enforcement of the covenants of the producers in the co-operative marketing contracts, California has not been in accord with the majority. [Cites Barlow case and mentions the Co-operative Marketing Act of 1923.] But in a case that came before the Superior Court of Santa Clara after the passage of this act, the court refused to follow the newly enacted law and applied the rule of the Barlow case. In 1925 the legislature again endeavored to help the co-operative associations by amending section 3423 of the Civil Code and adding a new section 3397. It is doubtful whether the amendment of section 3423 would of itself have the desired effect of changing the result of situations analogous to the Barlow case, for the defense of lack of mutuality applies in suits for injunctions as well as in a suit for specific performance, and the Supreme Court held there was such a lack of mutuality in the Barlow case as would prevent specific performance. But regardless of section 3423 and the construction put upon it by the courts, the new section 3397 says that the co-operative societies may specifically enforce their contracts against the producers, 'any provisions contained in this part of the Civil Code to the contrary notwithstanding.' It is difficult to see how the courts will be able under the unqualified language of section 3397 to do otherwise than decree specific performance in situations like the Barlow case." 15 Cal. Law Rev. 260

II. INJUNCTION

As has been indicated in several of the opinions quoted on the preceding pages, a decree of specific performance is the most extreme course which may be resorted to for the enforcement of co-operative contract obligations. In spite of the fact that this remedy has been granted in a rather impressive number of cases, it appears to have been considered desirable as a practical matter to approach the problem of contract enforcement with a flank attack by preventing delivery outside the co-operative association rather than by a frontal attack aimed to secure specific performance. Though a negative remedy, injunction is calculated to accomplish the same result as could be secured by the positive remedy of specific performance. Ordinarily it is the breaching member who is enjoined from delivering to anyone other than his association, but others may be enjoined from soliciting or acceptng products from a member under exclusive contract to a co-operative association.

Although this type of equitable relief has been open to co-operatives since they first began to employ membership contracts, it does not appear that the device was actually employed, or at least made the subject of litigation, until about 20 years ago. On February 7, 1908, the Court of Appeals of Kentucky handed down a decision [15] in which a motion to dis-

[15] Owen County Burley Tobacco Society v. Brumback, 128 Ky. 137, 107 S.W. 710 (1908).

solve an injunction granted by the lower court was overruled. The court apparently entertained no question as to the propriety of this method of enforcing the contract, assuming only that the pooling law of 1906 was constitutional. Finding it to be so (see page 351) the court of last resort affirmed the permanent injunction and said:

> It may be assumed from the fact that a number of persons have agreed with each other to place in the hands of an agent property owned by them for sale that each of them expects to derive some benefit or advantage from the arrangement; and however uncertain or speculative it may be, the agreement is binding on each of the parties to it, and neither of them will be allowed willfully to violate his pledge.

The pooling law itself made no specific mention of injunction as a method of enforcing its contracts, but hardly more than a month after the handing down of this decision the statute of 1906 was amended by the addition of the following clause:

> To prevent any breach or violation of any contract made for the purposes set out in the foregoing sections, a restraining order and writ of injunction may be issued by proper officers, as prescribed in the Civil Code of Practice.

Apparently no similar case came before a court of last resort until the recent "commodity marketing" movement got under way and the practice of enjoining members attained wide vogue. In 1921 a case [16]

[16] Washington Cranberry Growers' Association v. Moore, 117 Wash. 430, 201 P. 773, 204 P. 811 (1921).

arising under such a contract came before the Supreme Court of Washington, and the injunction was upheld. This position has been maintained in later decisions in the same state,[17] and a similar course has been followed in Oregon.[18] Likewise, as con-

[17] Washington Co-operative Egg and Poultry Association v. Taylor, 122 Wash. 466, 210 P. 806 (1923).

Pierce County Dairymen's Association v. Templin, 124 Wash. 567, 215 P. 352 (1923). This concerns an association incorporated under the law of 1913 and having a contract which called for stipulated damages but made no reference to injunction. The opinion says: "It is next contended that the association is not entitled to the remedy of injunction as against Templin because of the damage stipulation found in the above quoted portions of the contract. This contention is, we think, fully answered by our decision in Washington Cranberry Growers' Association v. Moore, 117 Wash. 430, 201 P. 773, 204 P. 811. Indeed, it seems to us that this contract presents a somewhat clearer case permitting the association to seek a remedy by injunction than the contract involved in the cranberry case did. . . . We are not deciding that there cannot be found in this contract some prescribed measure of damages applicable to all possible varying circumstances; but only suggesting the difficulties to be met with in an attempt to do so under varying circumstances, for the purposes of showing that there is even more reason here for permitting the association to resort to injunction as an alternative remedy than it was in the cranberry case. We conclude that the association was not, by the terms of this contract, precluded from seeking redress by injunction."

Grays Harbor Dairymen's Association v. Engen et al. 130 Wash. 169, 226 P. 496 (1924). "Appellants vigorously contend that there was no evidence justifying the court in issuing a permanent injunction in this case, no proof of any injury or threatened injury in the slightest degree to respondent. . . . Appellants lose sight of the recitals [as to the damage resulting to the association through breach of contracts] contained in the contract, which are not denied. While these recitals are mere recitals of fact, they are prima facie true, unless denied and facts to the contrary shown. . . . Wherefore there can be no question but that appellants put their necks within the halter, and there is no escape, under our cases heretofore cited."

Washington Wheat Growers' Association v. Leifer, 132 Wash. 602, 232 P. 339 (1925).

[18] Phez v. Salem Fruit Union, 103 Ore. 514, 201 P. 222, 205 P. 970 (1921). "While it is practically impossible to compel specific

tracts of this type and laws authorizing such arrangements spread into the cotton, tobacco, and wheat regions farther east, they have been upheld by a long line of favorable decisions.[19]

performance of a contract of this nature, there is abundant authority that the court may, by enjoining the contractor from selling his wares to anyone else, place him in a position where his own interests may be powerful enough to induce him to perform his contract. . . . The present case is one where the invoking of this power might be peculiarly efficacious." This case is one of peculiar interest, since the growers were in the position of third parties, whereas frequently co-operatives are faced with the problem of restraining others who attempt to prevent the carrying out of contracts between growers and their association. In this case the right of the injured party for redress against the outsider was clearly recognized in the court's words: "If the defendants be regarded as strangers to the contract of sale between the fruit union and plaintiff, as contended by defendants, the complaint is still sufficient as to the defendant growers under the rule that where a stranger wrongfully induces another to commit a breach of contract, or intentionally disables such other from discharging the obligations of his contract, the wrongdoer is liable in damages, or in a proper case may be enjoined from carrying out his wrongful purposes."

Oregon Growers' Co-operative Association v. Lentz, 107 Ore. 561, 212 P. 811 (1923). "As the contract in question is not oppressive, unjust, or illegal, and its enforcement by mandatory injunction restraining the defendant from selling his products contracted for to anyone except the plaintiff will work no injustice or hardship upon the defendant, and as plaintiff is clearly entitled to the relief granted, the decree of the Circuit Court is affirmed."

Oregon Growers' Co-operative Association v. Riddle, 116 Ore. 562, 241 P. 1011 (1926). (See note 3, p. 303.)

[19] Hollingsworth et al. v. Texas Hay Association, (Tex. Civ. App.) 246 S.W. 1068 (1922); Main v. Texas Farm Bureau Cotton Association, (Tex. Civ. App.) 271 S.W. 178 (1925); Texas Farm Bureau Cotton Association v. Stovall, 113 Tex. 273, 253 S.W. 1101 (1923); Arkansas Growers' Co-operative Association v. Brown, 168 Ark. 504, 270 S.W. 946 (1925); Dark Tobacco Growers' Association v. Dunn, 150 Tenn. 614, 266 S.W. 308 (1924); Brown v. Staple Cotton Co-operative Association, 132 Miss. 859, 96 So. 849 (1923); Warren v. Alabama Farm Bureau Cotton Association, 213 Ala. 161, 104 So. 264 (1925); Tobacco Growers' Co-operative Association v. Jones, 185 N. C. 265, 117 S.E. 174

Although in several of these decisions the court has indicated that it was influenced by the fact that laws providing expressly for this type of contract and these remedies had recently been passed in the given state, the Kentucky and Washington courts rendered their favorable decisions (Burley Tobacco Society and Cranberry Growers' Association, pages 355 and 310) in the absence of such statutory authorization. Likewise, the highest court of Kentucky, in handing down a favorable decision in an injunction case [20] under the new co-operative marketing act (1922), observed: "We think that the injunctive relief would be allowed upon general principles to prevent a breach of this contract by any member, even if it were not expressly allowed by the Bingham Co-operative Marketing Act." More recently the Supreme Court of New Hampshire has ruled [21] that

(1923); South Carolina Cotton Growers' Co-operative Association v. English, 135 S. C. 19, 133 S.E. 542 (1926); Kansas Wheat Growers' Association v. Schulte, 113 Kan. 672, 216 P. 311 (1923); Kansas Wheat Growers' Association v. Ast, 118 Kan. 247, 234 P. 963 (1925); Kansas Wheat Growers' Association v. Lochr, 118 Kan. 248, 234 P. 962 (1925); Kansas Wheat Growers' Association v. Charlet, 118 Kan. 765, 236 P. 657 (1925); Nebraska Wheat Growers' Co-operative Association v. Norquist, 113 Neb. 731, 204 N.W. 798 (1925); Minnesota Wheat Growers' Co-operative Marketing Association v. Huggins, 162 Minn. 471, 203 N.W. 420 (1925); Rifle Potato Growers' Co-operative Association v. Smith, 78 Colo. 171, 240 P. 937 (1925); Harrell v. Cane Growers' Co-operative Association, 160 Ga. 30, 126 S.E. 531 (1925).

[20] Potter v. The Dark Tobacco Growers' Co-operative Association, 201 Ky. 441, 257 S.W. 33 (1923).

[21] Manchester Dairy System, Inc. v. Henry M. Hayward, — N. H. —, 132 A. 12 (1926). This case was begun in the lower court prior to the passage of the Co-operative Marketing Act of 1925. Before it was appealed to the Supreme Court, however, the new co-operative law had been enacted and the association had come under its provisions.

injunctive relief should be granted under proper circumstances on general principles of equitable jurisdiction, saying:

> Authority, if any here, is to be found, not in the express stipulations for equitable relief, but in the general principles limiting equitable jurisdiction. The equity powers of the courts include the specific performance of contracts in cases where there is not a plain, adequate, and complete remedy at law. These powers, as a part of the general equity jurisdiction of our courts, antedate legislative sanction.

Indeed, objection is often made to the inclusion in co-operative acts of any provisions designed to govern the issuing of injunctions. In many quarters there is tenacious adherence to the principle that the right to issue an injunction lies solely in the discretion of a court of equity, and that for the legislature to dictate the terms upon which an injunction shall issue is an unwarranted interference with the courts and an invasion of the principle of separation of powers. This issue was met by the Supreme Court of Kansas in the Schulte case (cited in footnote 19), wherein it sustained the statute. However, dissent from this view is easy to find.[22]

The fact that in California the situation as to equitable relief differs somewhat from that in other states has already been referred to. If eventually the legislation of 1923 and 1925 covering this matter is upheld, the indirect as well as the direct

[22] See Mitchell, J. G., 9 Iowa Law Bull. 6.

method of securing contract enforcement will be available in that state in the same way that it is now being granted in numerous other jurisdictions.

Finally, a Wisconsin case [23] (compare Phez v. Salem Fruit Union, note 18, page 311) illustrates the use of the injunction to restrain outsiders from interfering in the operation of a co-operative association. In this instance local tobacco buyers had sought to persuade growers to break their contracts with a tobacco marketing association by selling their tobacco to the private buyers. After lengthy deliberation, the Supreme Court granted the association a permanent injunction [24] against the persons who were working to disrupt the pool. Similar action was taken against hay buyers in a Texas case,[25] where the court said:

As concerns appellant [a private buyer], he could not knowingly aid, abet, and designedly assist a member in undermining such a contractual relationship and undertaking between others and then escape on the ground that he was an outsider and entitled to pursue his own private business in his own way. If the finding indicated as to his part in the transactions be justified, the interference

[23] Northern Wisconsin Co-operative Tobacco Pool v. Bekkedal, 182 Wis. 571, 197 N.W. 936 (1923).

[24] The court pointed out that the association had some 6,500 members and that "while it may prosecute actions at law to recover damages for breaches of these contracts, it would require a multiplicity of suits, and the damages which it would sustain by reason of its inability to deliver the tobacco which it had sold to its customers would be difficult of proof. . . . These facts furnish a plain situation for equitable interference." The quotation on p. 326 also bears on the point here discussed.

[25] Hollingsworth et al. v. Texas Hay Association, (Tex. Civ. App.) 246 S.W. 1068 (1922).

with the rights of others was on his side entirely, and not only would it render him liable to the association in damages but also, under the general principle of equity, would confer upon it the right to enjoin him along with Hollingsworth.

Though it is not a question of equitable relief, this seems the appropriate place to refer to the effort of recent co-operative laws to make interference with co-operative selling contracts a misdemeanor and thus secure the aid of criminal courts. This clause of the Bingham Act is quoted on page 113. Several states in passing this type of law have dropped this provision, but approximately half the states having laws of the "standard" type have included this feature. It has been adjudicated in Kentucky and Minnesota, being upheld in the former and declared unconstitutional in the latter. The Kentucky court ruled: [26]

As the contract is one in furtherance of a legislatively declared purpose, then it was no doubt competent for the Legislature to throw such restraints around it as were reasonably necessary to protect its integrity, and we do not think the imposition of the penalty, plus attorney's fees as a part of it, is in excess of the power or authority of the Legislature in exercising its rights to preserve the integrity of the contract. Indeed, similar statutes to accomplish the same purpose by establishing a deterrent against others procuring a violation of acquired rights, and not to augment plaintiff's damages for their breach, have been upheld in many courts of the country. . . . Indeed, it is nothing uncommon to provide for such penal-

[26] Liberty Warehouse Company v. Burley Tobacco Growers' Co-operative Association, 208 Ky. 643, 271 S.W. 695 (1925).

ties, and that they may be recovered for the benefit of the one against whom the violation was directed instead of by the Commonwealth, and since warehouses are proper subjects of classification there can be no constitutional objection to penalizing them when they induce a member of the association to violate a contract in the manner set out in Section 27 of the act, and the penalty is not to compensate plaintiff for damage, but to punish defendant for doing the act prohibited by the statute. . . . It is competent for the Legislature to fix the amount of the penalty in such cases provided it is not unreasonable in amount.

This case was appealed to the Supreme Court of the United States, where the Kentucky law was sustained (October term, 1927) on the ground "that the co-operative marketing statutes promote the common interest [and that] the provisions for protecting the fundamental contracts against interference by outsiders are essential to the plan."

In the Minnesota case [27] the Supreme Court of that state made a clear-cut distinction between active efforts to impede members' deliveries and mere willingness to purchase from them if they voluntarily sought to sell.[28] The court said:

[27] Minnesota Wheat Growers' Co-operative Marketing Association v. Radke, 163 Minn. 403, 204 N.W. 314 (1925). This opinion covers also the similar case of Minnesota Wheat Growers' Co-operative Marketing Association v. Commander Elevator Company.

[28] In this connection it should be recalled that several Southern states have supplemented their co-operative enabling act by laws so regulating warehousemen as to require that goods stored or offered for sale with them must be correctly marked with the true owner's name and the records of their transactions open to inspection. Such laws (see p. 212) are an important aid to the co-operatives in checking the evasion of contracts and have been

Of course, it is well settled that a malicious interference by one not a party to a contract to induce its breach is a tort for which redress may be had. [Cases cited.] But section 27 does not stop with those who maliciously interfere with existing contracts between third parties. It makes it an actionable wrong for one who has used no effort or held out no inducement for a member of a co-operative marketing association to breach his contract with the association, except this, that he is ready at his usual place of business to buy or handle products that such member may voluntarily bring there for sale or disposal, the same as for an outsider. In other words,

upheld in Virginia in Reaves Warehouse Corporation v. Commonwealth and Motley et al. v. Commonwealth, 141 Va. 194, 126 S.E. 87 (1925), and Danville Warehouse Company, Inc. v. Tobacco Growers' Co-operative Association, Inc., 143 Va. 741, 129 S.E. 739 (1925). The opinion in the latter case said: "While it is true that the provisions of the act complained of are applicable to both warehousemen and co-operative associations, yet it was argued in the two cases of criminal appeal and also in this case that the motive and effect of the act is to promote the business of the co-operative association and to injure that of the warehouseman. . . . As to these matters, it need only be stated that they raise solely questions of public propriety and advantage, the determination of which belongs exclusively to the legislative department of the government, and present no questions for judicial decision by a court. . . . Whether or not the business of the complainant was injured by the passage of the act, and by the ensuing mandate of the law that the complainant should comply with the provisions of the act, are questions that become immaterial upon the holding by the court that the act was constitutional and valid." In the Reaves case the court expressed itself as follows: "Is it not manifest that, when the warehouseman actively aids the grower who is a contract breaker in the perpetration of a fraud either upon his fellow members and the association or upon any other, they do the very thing which is there condemned; that is, they conspire and hit below the belt? Is the law to be criticized when it condemns this as a 'fraudulent and dirty' blow? . . . If there has been an accepted business rule under which warehousemen justify themselves in thus using fictitious names and in this way conspiring with contract breakers to deceive and defraud others, the time has come when the state, in the exercise of its police power, should repeal that pernicious rule, and this is one, if not the chief, purpose of the statute."

the section attempts to prevent all dealings between members of a co-operative marketing association and outsiders in respect to products contracted for by the association, no matter how free from legal malice or devoid of inducements the conduct of the outsiders may have been, provided they knew that the product was under contract.

Elsewhere in the opinion the court made it clear that this ruling with reference to outsiders in no way modified the attitude of the court as to the members' responsibilities. (See Huggins case, page 328.) The latter "may be held to have agreed to all the terms of the statute, and are not in a favorable position to complain of infringement of the liberty of contract or that the damages or penalties prescribed in the statute are too drastic."

III. FAIR AND REASONABLE CONTRACTS

It is a fundamental and long-established principle that contracts must be fair and reasonable in their terms if courts of equity are to use their authority to insure their enforcement. Naturally, therefore, the attorneys who have come to court to present the case of the contract breaker have endeavored to show that such agreements were essentially unfair, unreasonable, or oppressive to their clients.

In answer to these allegations the courts have found repeatedly that the features characteristic of the typical grower's contract in use today are fair and reasonable with reference to the member, and that therefore such a contract *per se* is entitled to

the favorable consideration of courts of equity.[29] For example, the Supreme Court of Alabama replies [30] to such a claim:

As for the objection that the contract is unjust and unreasonable, there is nothing in the apparent purpose, or the stated terms, or the indicated operation of the contract which can support such a charge. Manifestly, it looks to the mutual advantage of all of the members of the association in the disposition of the cotton raised by them for sale in the open market.

In Nebraska Wheat Growers' Association v. Norquest the allegation that the contract was "unconscionable, inequitable, and oppressive" was rather curtly dismissed by the court. In the Manchester Dairy System case (page 313) the Supreme Court replied to the argument that the enforcement clauses were unreasonable because they might result in punishment by fine or imprisonment and "that such punishments would be neither merited nor a reasonable remedy for the breach" [31] by saying:

Hardship may be a sufficient ground for withholding specific relief. But the hardship here intended is the hardship to the defendant from the enforced performance

[29] Although, of course, a particular instrument may be crudely drawn and fail to observe the necessary elements of fairness and reasonableness, or there may be exceptional circumstances, making the enforcement of a particular contract inequitable. (Compare p. 322ff.)

[30] Warren v. Alabama Farm Bureau Cotton Association, 213 Ala 161, 104 So. 264 (1925).

[31] "This was not argued by counsel, but was expressed by th trial judge in his memorandum of opinion on which the appeal was taken." Reuben Hall.

of the contract or other enforced compliance with an order, and not the hardship invited by reason of disobedience of the decree of the court. The presumption always is that the defendant will obey the order of the court, whereas the finding of the supposed hardship here is expressly predicated upon the presumed persistence of the defendant in the breach of his contractual duty, in defiance of the court's mandate. The finding that punishment under such circumstances would "neither be merited nor a reasonable remedy for the breach" is without support in fact or law.

Neither have courts been disposed to give much weight to allegations that the business management of co-operative associations is so faulty as to prejudice the grower's interest and to make the enforcement of the contract harmful. With such a plea before it a North Carolina court observed: [32]

> A member of the defendant corporation cannot take advantage of alleged mismanagement as a defense to his contract, and besides there was no evidence sustaining the allegation of mismanagement;

and more or less similar defenses were brushed aside in Washington Co-operative Egg and Poultry Association v. Taylor [33] and Nebraska Wheat Growers' Association v. Smith.[34]

In view of numerous efforts in the direction of "orderly marketing" which have been made a part of co-operative undertakings during the past few

[32] Pittman v. Tobacco Growers' Co-operative Association, 187 N. C. 340, 121 S.E. 634 (1924).
[33] 122 Wash. 466, 210 P. 806 (1923).
[34] — Neb. —, 212 N.W. 39 (1927).

years, it is but natural that delays in settlement should be given great prominence in the claims of contract breakers that management was bad and the results oppressive to the member. Mere delay in settlement has not been viewed by the courts as an abuse but as something incidental to the whole co-operative method of marketing. Such views are set forth in the Cane Growers' Association case (footnote 19, page 313) and Northwest Hay Association v. Hanson.[35]

But while delay in settlement is not considered in and of itself as operating to release the member, the situation may be otherwise where the inability of the association to make settlement of a pool so deprives a producer of necessary income as to cripple his operations. Under such conditions the Supreme Court of North Carolina, which early and aggressively gave its aid in establishing the binding character of co-operative contracts, ruled as follows: [36]

> While we are of opinion as stated that the facts as now presented would not uphold a finding of bad faith on the part of the association and its management, it does not at all follow that on this record the court should continue an injunction to the hearing in aid of plaintiff's suit. . . . It is an accepted rule that an injunction will not usually be granted or continued where "it will do more mischief and work greater injury than the wrong which it is asked to redress." . . . Defendant acting in accordance with

[35] 135 Wash. 47, 236 P. 561 (1925).

[36] Tobacco Growers' Co-operative Association v. Bland, 187 N. C. 356, 121 S.E. 636 (1924).

his contract delivered to plaintiff his entire tobacco crop for 1922; he delivered two-thirds of his crop for 1923, and owing to failure on part of plaintiff to properly account and pay over the balance due from the sales of 1922, amounting to about $800, he was compelled to sell the remaining one-third of the 1923 crop to raise money for the necessary supplies of himself and family. . . . The defendant, as far as he could reasonably do so, has acted in perfect loyalty to the contract and was doing his best to perform, and the damage threatened by its issuance [injunction] far surpasses any injury to be expected from a denial of the writ.

Courts of equity are being called on to pass upon a variety of reasons put forward by breaching members claiming release from their contracts. While they have consistently supported the contract as such, the fact that members' interests have also been safeguarded, and the operations of the co-operative management rigidly scrutinized, is further illustrated in two cases in which members have been released from their contracts. In New Jersey Poultry Producers' Association v. Tradelius (96 N. J. Eq. 683, 126 A. 538 (1924)) it appeared that the association had departed from the methods of marketing authorized in the agreement and members' meetings—selling through brokers at heavy expense, failing to grade and classify properly, deducting more than the authorized service charge and receiving less than market price, and conducting the affairs of the association "in an unbusinesslike manner." On these grounds the court released the member even though he had been "a director and participated in many

of the meetings of directors, particularly in the contract with Mapes, concerning which he cannot be heard to complain. I am convinced that otherwise he is not barred from setting up the defenses claimed by him."

In Staple Cotton Co-operative Association v. Borodofsky (104 Miss. 91, 108 So. 802 (1926)) the defendant charged

> that the cotton association had in the year 1924, at planting time or before, materially breached its contract, in that many thousand bales of cotton had been released from the operation of the marketing agreement by the directors of the association; . . . that the said release of members, by the release of their cotton, from the operation of the terms of their contracts, to cotton brokers and banks to be sold on the outside, was antagonistic to the true intent and spirit of the co-operative corporation. And not only was it a breach of the contract, but that such breach operated to defeat the purpose of the organization; that the damages could not be ascertained, and that he was without adequate remedy other than by a cancellation of the contract. . . . The release was signed by the president on the authority of the board of directors and was for the purpose, as stated by Mr. Bledsoe, of permitting the grower members of the association to produce cotton because the banks and brokers would not furnish supplies necessary to make the crops without this or a similar release; . . .
>
> The court below cancelled the contract in this state of the case, and we have reached the conclusion, after a very careful study of this record, that we must reluctantly assent to the correctness of the Chancellor's finding. . . . So that when it is conceded that the cotton was released, necessarily there was a breach of a serious nature of the contract which materially affected Boro-

dofsky, because the courts have uniformly held that where these associations are formed for the purpose of marketing the product, these mutual agreements were of material benefit to the association and to each member thereof, and that the penalty prescribed would be enforced. This view is sustained in part by section 17 as follows: "All parties agreeing that this contract is one of a series dependent upon its true value for the adherence of each and all of the growers to each and all of the said contracts." [Quotes from Schulte (p. 327), Huggins (p. 328), Dunn (footnote 8, p. 408), and Jones (p. 367) cases and Haarparinne v. Butter Hill Fruit Growers' Association, 122 Me. 138, 141, 119 A. 116 (1922), and concludes] the value of this contract to each of the members thereof depended upon the other members adhering to it, and we must say that this release by the directorate and other directors, giving to them the right to sell their cotton on the outside insofar as they could incumber it to the people to whom it was released, was such a breach of the contract as released Borodofsky from adhering to it.

IV. NO ADEQUATE REMEDY AT LAW

Finally, the attempts of co-operative associations to invoke the aid of courts of equity for the enforcement of their contracts were from the beginning resisted by defaulting members on the ground that there were adequate remedies at law. This defense has met with no support thus far in courts of last resort. There are indeed several very clear-cut and comprehensive opinions to the contrary embodied in decisions which have been handed down in various parts of the country. The view that remedies at law were inadequate was enunciated in the first co-operative injunction case to come before

a court of last resort.[37] The court took as a premise for its whole discussion the inadequacy of the legal remedy of damages, saying:

> The injury to the society could not be measured in dollars and cents. Organized for the mutual protection and advantage of each of its members, receiving no gain, and making no profit from their transactions, it would be wholly impracticable to estimate what damage it would sustain if the members should dispose of their crops. The life and usefulness of the society depends entirely upon the fidelity of the members in observing the agreement, and their failure to comply with it would necessarily work a dissolution of the society, and consequently have the effect of depriving the members of the benefits and advantages they might expect to derive from its existence. What these benefits or advantages may be does not appear in the record before me; nor is it necessary indeed that it should.

This same general view was again expressed in the second important case in this field. The Supreme Court of Washington[38] in 1921 spoke as follows:

> The appellant claims that there should be recourse only for damages. . . . The contract provides that to accomplish its purpose it is necessary that the appellant strictly and fully comply with and perform the stipulations and agreements on his part. . . . There was not an adequate remedy at law because an action for damages would not be sufficient to protect the respondent and

[37] Owen County Burley Tobacco Society v. Brumback, 128 Ky. 137, 107 S.W. 710 (1908).

[38] Washington Cranberry Growers' Association v. Moore, 117 Wash. 430, 201 P. 773, 204 P. 811 (1921).

the other growers which it represented in accomplishing the purposes of the undertaking.

Likewise in the first co-operative contract case to come before the court of last resort in Kansas [39] the court recognized the peculiar situation of a co-operative association as distinguished from the ordinary profit-seeking commercial organization, saying:

> This association was organized for the sole purpose of marketing the wheat raised by its members, and performing such functions as are incidental thereto. From the very nature of things it must have the wheat or it cannot exist. It has no power to buy wheat; hence it cannot go into the open market and purchase wheat to fill its contracts of sale, if the members fail to deliver, and thus sustain its existence or recoup its loss. Even the payment of damages of 25 cents per bushel stipulated to be paid by a member for each bushel he produces and sells elsewhere would not sustain the association and enable it to do the business for which it is incorporated. Hence, as a practical matter, it is of little consequence that the member is solvent and able to respond in damages. If the association received damages from all, or a substantial portion, of its members, it would cease as a going concern, or be so seriously handicapped as to destroy its usefulness. Wheat is the only commodity the association can use as a going concern. All it can do with money is to pay its expenses and disburse the balance among its members. It necessarily follows that there is no adequate remedy at law. The only adequate remedy is injunction, preventing the member from selling to others, and thus forcing the delivery of the wheat to the association.

[39] Kansas Wheat Growers' Association v. Schulte, 113 Kan. 672, 216 P. 311 (1923).

This view was followed and somewhat elaborated in Minnesota,[40] where the court ruled flat-footedly that liquidated damages were not enough and the association was entitled to equitable redress. Following with some comments on the mutual character of the business and its dependence for success "entirely upon the performance by the members," the court added:

> It must, to carry out its purposes, make contracts for the disposal of the products acquired by the membership contracts. In making such contracts of disposal, as well as contracts for necessary instrumentalities needed in conducting its business, it must know that it will get the products contracted for. From the very nature of the association it must have the wheat, or it cannot exist. Wheat is the only commodity it can use as a going concern. It does not have power to go into the market and buy it. It must have this information in advance and prepare for the future. It must arrange for help, capital, and perhaps storage. If one or more members may disregard their contracts with impunity and a loss occurs, there is no way to meet such loss, and if it may be said to be a loss that must be met by the members who remain, then it is obvious that few persons would join or remain members. The consequence would be so serious to plaintiff that the remedy at law is wholly inadequate, nor can it be said that the legal remedy is either full or complete. . . . The members' breach of such a contract is so fraught with consequences to both the association and the individual members thereof that equity cheerfully puts out its restraining hand, with the admonition that the member under such circumstances must not violate the covenants he has voluntarily assumed.

[40] Minnesota Wheat Growers' Co-operative Marketing Association v. Huggins, 162 Minn. 471, 203 N.W. 420 (1925).

Other courts have declared themselves in the same vein.[41] However, it might be suggested that there is in these several opinions a tendency to deal in rather vague generalizations as to just what are the needs of the co-operative association which cannot be met by the payment of damages. These do in fact appear to fall under four general heads.

[41] In this whole question of equitable relief it is easy to magnify the importance of these remedies or to exaggerate their coercive effect. On the other hand, it is equally easy to miss their real significance as disciplinary measures having a proper part in an organization of the personal character which distinguishes co-operative enterprise. A very sound and discriminating appraisal of this feature of co-operative practice is contained in a doctoral dissertation submitted to the faculty of the University of Wisconsin by Mr. George Johnson, now of the Pennsylvania Department of Agriculture. He says: "The great value of injunction is to remove the most serious psychological causes of disloyalty coming from either within or without the organization and thereby to keep the association intact, the morale unshattered, and the influence of fickle minorities from spreading throughout the membership. . . . Law seeks to keep any minority faction within a co-operative association in harmony with the majority. Legally, therefore, such matters as contract enforcement, grants of injunction, and decrees of specific performance are problems of minority discipline and regulation. When it becomes otherwise, that is, when such matters relate to majorities rather than minorities, it is no longer a problem of contract, of law—it then resolves itself into the very serious economic question: Did circumstances and conditions actually justify the formation of the co-operative institution or was there not in the beginning serious miscalculation as to type of organization, caliber of management, and method of operation which inevitably led to lack of confidence and to indifferent majorities in the membership? Manifestly, when a telling wave of disloyalty sweeps over any large group of co-operating producers, the 'life-preserver' must be found in economic, not legal, action. To the end that lawsuits are enlightening to the contract-breaker, they are invaluable. But, co-operative enterprise cannot be projected exclusively through law-suits. It should be the policy of every organization, however, to protect its loyal members against the contract breaker, and litigation should be vigorously pursued whenever the occasion demands it, for, after all, a co-operative association will succeed only through the loyalty and enthusiasm of its members."

First, the breaching of contracts prevents the association from fulfilling agreements actually entered into or creating for itself a favorable and permanent position in the trade with the good will which is essential to commercial success. Second, it also spreads fear and dissatisfaction to other members of the association, thus breaking down the morale which is important in any membership organization. Third, losses cannot be made good by going into the open market to purchase a product in lieu of that pledged by the defaulting members. Fourth, there appears to be a somewhat imponderable benefit to be derived from the maintenance of an actual commercial solidarity among all those who have entered into the marketing agreements.

The first two of these reasons appear to be set forth with sufficient fullness and clarity in the opinions. As to the third, it would appear that there is a certain inconsistency in demanding special consideration for co-operative associations by reason of their inability to secure product from non-members and at the same time to insist, as is done in the Capper-Volstead Act and elsewhere, that they should have the privilege of handling the product of non-members to an amount equal to that handled for members. The fourth proposition also raises some question. If the maintenance intact of a certain quantity of product is for the purpose of securing advantages other than the economies and increased efficiency of co-ordinated handling of a

large volume of a given commodity, the question inevitably arises as to just how this less tangible advantage is related to questions of market strategy, the acquiring of a dominant position in the trade, and actual or incipient control of the market. Certainly in resting their cases as strongly as co-operatives frequently do upon this phase of their needs, they run the risk of exposing themselves to attack on the ground of price control or restraint of trade. This question is so large and so important as to require separate chapters for its discussion.

CHAPTER XIV

EARLY CASES ON RESTRAINT OF TRADE

While the member's contract is the instrument in which the distinctive practices of co-operation come to definite expression and around which legal battles chiefly center today, it must not be forgotten that co-operative organizations were attacked as conspiracies in restraint of trade long before the present contract stage of development had been reached. The general structure and practices of co-operative organizations caused them at least 35 years ago to be assailed as combinations in restraint of trade, and to understand the present problem it should be reviewed in the light of this historic development.

I. CO-OPERATION UNDER COMMON LAW AND GENERAL STATUTES

Reference has already been made in the chapter on Federal legislation to the fact that the alleged monopolistic character of co-operative organizations had already become an issue when the Sherman Anti-trust Act of 1890 came up for discussion in Congress. This Federal anti-trust law was shortly followed by a considerable number of state

statutes of similar character, Illinois being one of the leaders with its statute of 1891. Within a relatively short time a milk producers' organization operating in the city of Chicago was involved in litigation and attacked as an illegal combination under the state anti-trust law. This case ultimately came to the Supreme Court of the state, where a decision adverse to the association enunciated a view which was quite consistently maintained for more than 20 years thereafter. It was made clear that co-operative marketing arrangements ran counter to the prevailing interpretation of common law principles and the provisions of anti-trust statutes.

In the Chicago milk shippers' case [1] some 1,500 producers of fluid milk for the Chicago market had organized without formal contracts into a collective bargaining association for negotiating a price with the milk distributors. The bare fact that it was group action designed to influence prices favorably to the producer constituted this association an unlawful combination in the judgment of the court. Without apparently finding it necessary to take account of the stated purpose of the association to secure for the producer of milk "a just return for the sale of the same; to rid the field of city distribution of irresponsible and dishonest dealers; to establish a central bureau of information for the

[1] Ford v. Chicago Milk Shippers' Association, 155 Ill. 166, 39 N.E. 651 (1895).

shipper's benefit; and to secure to the dealer of milk a pure, wholesome, honest quality of that product," or to inquire about the actual effects of its operation, the court held:

> That the object of the association is to control the price of the purchase and sale of milk to retail dealers within the limits of the city of Chicago is clearly apparent, and this object is carried out by the concurrent action of the members and association; by the action of the association on the one part, aided by the agreement of its members who, assenting to the constitution and by-laws, carry out a scheme which is a combination, agreement, or trust by which they fix the price of an article of merchandise, and limit the amount to be sold within the corporate limits of the city of Chicago.

In the state of Texas the sort of difficulty encountered in the above case had been foreseen at the time of the passage of the Texas anti-trust law of 1889, and an attempt made to exempt agriculture from the provisions of that law by inserting the following section: "The provisions of this act shall not apply to agricultural products or livestock while in the hands of the producer or raiser." Two years after the decision in the Ford case this provision of the Texas law was attacked on the ground that its effect was to deny to a considerable number of the citizens of the state the equal protection of the law. This case[2] was tried in a Federal circuit court. While it did not involve farmers or a farmers' organization, it sheds a good deal of light on the atti-

[2] In re Grice, 79 Fed. 629 (1897).

tude of the time with reference to co-operative organizations. The court declared the law unconstitutional both as taking property without due process of law and as denying part of the citizens the equal protection of the law, saying:

This statute under discussion is clearly class legislation discriminating against some and favoring others. . . . All of the decisions hold that where a distinction is necessary in classes of citizens, under the law, in every instance the classification must be reasonable. What ground can there be for setting aside, as this act has done, four-fifths of the citizens of Texas as an exempt class from the punishment for felony because they are producing farmers? It is not because of their poverty, for they are not poor; and, if some of them are, they do not constitute all of the poor. It is not because of the character and location of their occupations. Neither can it be said to be on account of the lack of intelligence or ability to take care of themselves. It cannot be on account of the character of the products they produce, for one of the avowed purposes of the act was to prevent combinations and injury to the people and to protect their acquirements of the commodities necessary for the enjoyment and sustenance of life; and yet the act puts it within the power of the men who produce nearly all of these articles to combine and raise the price and control it in any way they please. . . .

We are familiar with the duties of the farmer and the cares and trials of his business life, and appreciate highly the customary compliments paid by mankind to the rural yeomanry of the land. He has been justly lauded for his integrity and for the importance and independence of his calling. Without the products of his toil, people cannot live, nor society endure. Yet what is there about all that to entitle him to the privilege of combining in restraint of trade as to those articles he produces, while his neighbors,

the storekeeper and the mechanic, are precluded therefrom. . . . If there is any one thing evident from a careful study of the Act, it is that it is aimed to favor the agricultural classes and is against the merchant and mechanic, and all the others, without either reason or justice. . . .

This law that deprives the citizen of many of his rights of contract, and that seeks to divide citizens not exactly by the calling they follow but by the source of the property they hold, and exempts eighty per cent of them from the penalties it visits upon the remainder, is not sustained by any good reason or excuse; is not just; is utterly without support in law, and can have no just purpose; is vicious class legislation depriving the citizen of his constitutional right of life, liberty and property without due process of law, contrary to the law of the land; and is therefore declared to be null and void.

Five years later the famous Connolly case [3] put the Supreme Court of the United States on record in support of views similar to those of the circuit court in the Grice case. It said:

If combinations of capital, skill, or acts . . . are hurtful to the public interests and should be suppressed, it is impossible to perceive why like combinations in respect of agricultural products and livestock are not also hurtful.

As in the Grice case, no farmers' organization was involved and no opportunity afforded therefore to accredited spokesmen of co-operation to present any facts or argument in support of the wisdom or propriety of granting special treatment to such organizations, or to show that they were in their

[3] Union Sewer Pipe Company v. Connolly, 184 U. S. 540, 22 Sup. Ct. 431 (1902).

character or effects different from the industrial combinations at which the anti-trust statutes of the time were specifically aimed. This question of classification for purposes of legislation will recur frequently in our later discussion.

The period which we have now entered was one of greatly revived activity among co-operatives and considerable controversy in their attempt to establish themselves in the field of competitive business. The maintenance clause was coming into considerable vogue as a means of assuring permanent support and giving the necessary stability to farmers' associations. This, in turn, became the basis of litigation, and in 1913 brought such an arrangement before the Supreme Court of the state of Iowa. The case [4] involved a livestock shipping association organized as a corporation for pecuniary profit under the general laws of the state, in which there was at that time no co-operative statute. Evidence clearly showed, however, that the operations of the company had been conducted along co-operative lines with no purpose to "heap up a surplus nor any intention to make a profit in order to distribute a dividend among the stockholders." Over a period of two years they had, in fact, paid no dividends and accumulated only $29 on a business amounting to $433,639.

The economic situation and reasoning involved

[4] Reeves v. Decorah Farmers' Co-operative Society, 160 Ia. 194, 140 N.W. 844 (1913).

in this case are of considerable interest. It was testified:

> The purpose of the incorporation of this society was to establish a market where the farmers would receive for their hogs what they were worth in Decorah. The market at the time was not considered a good hog market. The society was organized for selling their hogs and buying them, or any farmer who preferred to ship his own stuff could ship it through the company by paying five cents a hundred on hogs shipped or five dollars a carload. The fact of the matter is, this society was formed primarily as a selling agency for the members of the society and for the bettering of market conditions here in Decorah, and that has been its purpose during its entire business life and still is its purpose.

The plaintiff in the case was "a local hog buyer in the town of Decorah buying for the Chicago market, and he claims that the defendant society was and is so organized as to drive him from the field; that the members are bound to sell their hogs to the society under a penalty of paying it a forfeit, and that it was organized for the purpose of monopolizing the business at Decorah, and was so operating not only by and with its members and stockholders but with strangers as to force him to pay more than the market price or to get out of business at that place."

It is true that the by-law of the association covering the payment of maintenance charge used the word "forfeit" and thus gave some color to the court's view that this was a penalty. Likewise, it was somewhat unfortunate that the association was

operated on a basis of outright purchase from the farmer and sale for the account of the society rather than merely shipping the product of the members and remitting to them the proceeds less costs of handling. The strictly co-operative character of the enterprise was still further compromised by reason of the fact that some product also was purchased from non-members. This fact seems particularly to have drawn the unfavorable attention of the court. After quoting from the anti-trust law of the state the opinion continues:

> Without reference to this chapter, monopolies have always been odious at common law, and all contracts, arrangements, or agreements in restraint of trade or of free competition were void. It was not necessary under the common law that the monopoly be perfect, as it was a tendency rather than its ultimate effect which the law reproved. As a rule a contract which creates such a monopoly as to put it in the power of such combination to raise or lower prices is invalid. A contract or arrangement between persons in a given business whereby they seek to control the price of the article is invalid, especially when the article in question is one of necessity or in general use.
>
> Whilst originally all contracts in restraint of trade were illegal, some exceptions were introduced into the common law and the rule now seems to be that such contracts are not illegal save when unreasonable in character. . . . Again the doctrine of restraint as applied to the early cases has been broadened, and all contracts in unreasonable restraint of competition are now understood to be in restraint of trade. . . . "He who has commodities to sell in the market has the same right to competition among buyers as the purchaser has to competition among sellers."

So long as competition is regarded as the life of trade all combinations, contracts, arrangements, or agreements made to stifle, or which may have that effect, are regarded as unlawful save as heretofore stated, where connected incidentally with some other contract as of purchase or sale or with contracts for employment, etc., so long as their restraints are reasonable and just. But where disconnected with some other contract and made enforceable by fine or penalty we think they come within the bar of the law.

That such fine or penalty made the society an illegal one is to our minds too clear for argument. Plaintiff was placed at a disadvantage and could not compete with the society in purchasing hogs from its members, and the members were not free to deal with plaintiff. If they dealt with him, he either forfeited his profits, by reason of having to pay too much for his hogs or they forfeited a part of the purchase price as a penalty for selling to another. To our minds, this was undue restraint of competition, or, as the term is now understood, "restraint of trade."

Let us reduce all this to its baldest and briefest terms. A local hog buyer or buyers are maintaining such wide margins between the terminal and the local price that farmers do not consider this town "a good hog market," but feel that they must establish a marketing outlet of their own if they are to "receive for their hogs what they were worth in Decorah." During two years' operations they pay producers the terminal price less actual operating costs, at the end of which time the local buyer brings them into court because this competition threatens to "drive him from the field." He asserts that the payment of a five-cent maintenance fee tends to

monopolize the business in the hands of the society, and that its operations "not only by and with its members and stockholders but with strangers . . . force him to pay more than the market price or to get out of business at that place." The court, invoking common law principles, declares this maintenance agreement void because of a *tendency* toward monopoly and its restraint upon free competition. This decision has been one of the most widely discussed in the whole field of co-operative litigation.

Since the opinion expresses the view that restraints of trade are illegal only "when unreasonable in character," it would appear that the court held it to be unreasonable for a group of producers to withdraw their business from the general market to be handled through their own agency because they believed it could thus be done more economically. As to retraint of trade, it holds that competition in making the local price was more free and active before the farmers' selling agency entered the market than it was thereafter. Inasmuch as there were many producers in the neighborhood who were not members of the association or bound by its maintenance clause, the private buyer's claim that he would be driven from the field might have been answered by pointing out that this would be true only if he were unable or unwilling to operate on the same handling margins as the association. Any drift of the bulk of the business into the hands of the farmers' selling agency was presumably to be

explained in terms of a superior market service secured by patronizing it.

While unquestionably the business done with strangers impaired the strictly co-operative character of the enterprise, it is hard to see how this forced the buyer to pay more than the market price in order to get their business. Such non-members could not be assessed the maintenance charge, and hence were free to deal with the buyer or the society as they saw fit, comparative price being the only determinant as to where their business should go. The buyer would have to pay more than the market price only as a means of taking from the co-operative the product which had been pledged to it and upon which they had depended in setting up the association, hiring a manager, and making other arrangements for handling the business.[5]

[5] Since this decision amounts to a denial of the right of collective bargaining on the part of farmers, an earlier decision of the same court, written by the same judge, is of considerable interest. In Rohlf v. Kasemeier et al. (140 Ia. 182, 118 N.W. 276 (1908)) an agreement among 13 physicians and surgeons establishing their fees was held not to be in restraint of trade. Although this decision was based primarily on a ruling that labor is not a "commodity" in the meaning of the anti-trust law, the court took a very liberal attitude as to the collective bargaining activities of labor unions, saying: "It is the right of miners, artisans, laborers, or professional men to unite for their own improvement or advancement or for any other lawful purpose. . . . The right to combine for the purpose of securing higher wages is recognized at common law." If it be argued that the disapproval of the farmers' collective bargaining activities in the Reeves case was based primarily on the attempt to enforce it by the payment of a penalty, it is a matter of common knowledge that the whole existence of collective bargaining unions depends upon disciplinary measures which embrace fines, loss of sickness or unemployment benefits, and other material or social methods of constraint.

While the payment in this case was referred to as a forfeit, in a similar case [6] a charge of the same amount on livestock and of one cent per bushel on grain was referred to as "liquidating damages." In the latter case also the court ruled that "the by-law was clearly in restraint of competition and therefore illegal," citing the Reeves (Decorah) case as authority. It is obvious that such charges were barely enough to cover actual handling costs, which is the intention of the maintenance clause. They had no punitive and little deterrent effect, since the member was encouraged to sell outside whenever others offered a price inducement. Five cents per hundredweight on hogs at prices prevailing at the time would have been much less than one per cent as compared with liquidated damages of 20 or even 50 per cent upheld elsewhere, or of 10 cents a pound on cotton, or 25 cents a bushel on wheat regularly enforced today.[7]

Just a month after the handing down of the decision in the Decorah case, another adverse decision was rendered by the Court of Appeals of Alabama in a somewhat similar case.[8] This involved a marketing association organized under the general corporation laws of Georgia. The court said: "If the

[6] Ludowese v. Farmers' Mutual Co-operative Company, 164 Ia. 197, 145 N.W. 475 (1914).

[7] "This seems to be based upon the principle that the legislature has, in effect, arbitrarily defined a penalty as 'liquidated damages.' It is in fact a penalty." J. G. Mitchell. (Compare footnote, p. 293.)

[8] Georgia Fruit Exchange v. Turnipseed, 9 Ala. App. 123, 62 So. 542 (1913).

contract is in violation of either [the state or national anti-trust] law, it is void as contravening a positive statute; and, even if it does not go to the extent of being in actual violation of either statute, yet if it tends to create a monopoly by unreasonably restraining trade, it is still void under our law, as at common law, as being against public policy." Admitting that the test of what is reasonable or unreasonable restraint of trade is difficult, the court took the position that "if the main purpose or natural and inevitable effect of a contract was to suppress competition or create a monopoly it was illegal." On these grounds the court took exception to a clause in the contract providing for the payment of a five-cent commission to the Fruit Exchange on goods sold at the orchard or f.o.b. the local shipping point. The court held that such payment was a penalty designed to force selling through the association and "thereby enable it to control the distribution of 60 per cent of the peach crop and a larger proportion, if plaintiff could get other growers into its association." This conclusion grew out of the fact that the contract was to become binding only when 60 per cent of the growers had signed similar contracts. In the judgment of the court:

> It gave plaintiff a commanding position in fixing the price of peaches in this section of the country. It could direct the market to which any shipment was to go, and withhold from any market all shipments, or limit the supply at a particular market, thus forcing up the price. It is clear that the real design was to stifle and destroy at

the various markets competition between the defendant and the other growers, who became members of the plaintiff association, by allowing plaintiff to divert the crop from the channels of trade in which it would have ordinarily flowed if each grower had been left to act independently and to choose his own market, and to so direct the shipments of these several growers as to void competition between them at markets where they before competed. . . . The restraint upon trade is of course, not so far-reaching and the ability to fix prices not so commanding as it would have been if all the peach growers, instead of 60 per cent, signed such contracts with plaintiff and became members of its exchange; but so far as this restraint and ability goes, it is of precisely the same character and produces the same class of results, and is subject to the same legal objection. Courts will not stop to inquire as to the degree of public injury when the main purpose or natural and inevitable effect of a contract is to suppress competition. "If its object is to prevent . . . free and fair competition in trade, and may in fact have that tendency, it is void as being against public policy." [Cases cited.]

The language of this opinion is extremely interesting in that the court apparently thought it desirable to restrain just the sort of practices in the administration of market supplies which today pass under the head of "orderly marketing." The implication of the argument would apparently be that it was against the public policy of the state of Alabama to permit an organization which increased returns to the producers of that state because it might tend to deprive consumers in certain distant markets of the bargain prices which they might otherwise enjoy at times when markets were glutted

by the extreme competition when peaches were poured into those markets by many unorganized producers. Likewise, no account was taken of the fact that the more intelligent distribution of shipments would tend to increase competition and lower consumer prices at points which would suffer periodic scarcity under conditions of unorganized marketing.

In neither the Decorah case nor the Turnipseed case was any account taken of the fact that the organizations were local in character, but shipped their product into the central markets of the country, where prices were made in competition with producers of all other sections. It might be noticed further that the 10 per cent charge made by the Georgia Fruit Exchange for peaches sold by them was only the customary brokerage, and that the 5 per cent charge made "on orchard and other sales f.o.b. my station" was, in most cases at least, a lighter marketing charge rather than a heavier one, as the court argued. Unfortunately, the contract explained this charge as being "in consideration of a protected market and consequently enhanced price" instead of being a fair recompense to the association for the maintenance of its agencies for the service of all the growers. This is in marked contrast to the reasoning in a subsequent decision of the Supreme Court of Alabama to which we shall later refer. The Alabama Court of Appeals quoted at some length from the Ford case mentioned above

(page 333), apparently feeling that the reasoning in that case should control.

The Decorah case has been heavily leaned upon by counsel seeking to find means for their clients to evade not only the kind of by-law provision involved in that case, but also in connection with more or less dissimilar cases arising under more recent contract forms. Most courts have not been greatly impressed by its conclusions (see page 358), but in Colorado the Iowa decision was followed in a case [9] involving a farmers' elevator having in its by-laws a maintenance clause of the prevailing type calling for the payment of one cent per bushel on grain sold outside the organization. It would seem that the by-law was rather clumsily drawn in that it suggests an interest in checking business with a competitor rather than the vital importance to the association itself of the particular arrangement in question. The by-law read: "The stockholders of this company may sell grain to competitors in Wray only by paying to the secretary of the Wray Farmers' Elevator Company the sum of one cent per bushel." On the other hand, the charge of one cent is extremely moderate, as compared with liquidated damages of 25 cents per bushel which, under recent co-operative statutes, have frequently been upheld by the courts of states in which the recent wheat pools have been operating.

[9] Burns v. Wray Farmers' Grain Company, 65 Colo. 425, 176 P. 487 (1918).

While the line of prevailing adverse decisions which we have been tracing carries us down to 1918 (and others as late as 1925 are noted in the later pages of this chapter), we begin to find cases which indicate a more liberal attitude on the part of courts and distinctly a tendency toward more adequate analysis of the actual economic situation and the effects produced by co-operative organization. In New York an association [10] formed in 1909 had employed a written agreement in which members agreed to subscribe to stock, deliver to it all their milk, except for specified exceptions, and to pay certain authorized service charges:

> In case of failure to deliver milk as above provided, he or she, as the case may be, will pay to the treasurer of said corporation to be formed, at the rate of $2 per cow for each year, so long as said failure or refusal shall continue, . . . and said $2 per cow shall not be considered as a penalty for the failure aforesaid, but it is hereby agreed that said sum of $2 per cow shall be treated and considered as liquidated damages for any failure to deliver milk as herein provided.

That a business concern undertaking investments for the benefit of its constituent membership should properly and of necessity make such agreements for its support was fully perceived and clearly set forth by the court, which said:

> It seems to me quite clear that the agreement in question constitutes a valid and binding contract on the part

[10] Castorland Milk and Cheese Company v. Shantz, 179 N. Y. S. 131 (1919).

of defendant, which is enforceable by the plaintiff. It recites that the parties were all interested in the establishment of a milk station, and for that reason they subscribed and agreed to pay for the capital stock of a corporation to be organized for the purpose of building and equipping the same, which was to receive, sell, ship, or manufacture into butter or cheese the milk produced by the persons aforesaid. The agreement further provided that each person should deliver all the milk he produced at said station when ready for occupancy, except . . . Acting upon this agreement, the plaintiff was incorporated, constructed and equipped a milk station, and received and disposed of all the milk produced by the subscribers to said agreement, and paid them their dividends therefor down to April 1, 1916, except the defendant, who withdrew his milk therefrom on March 31, 1915, as above stated. It is apparent, therefore, this agreement possessed all the elements of a valid and binding contract . . . I cannot see how the agreement in any respect offends the law, as being an illegal monopoly and an unreasonable restraint of trade. . . . It is quite clear that the penalty of $2 per cow fixed in the agreement may be recovered as liquidated damages in this action.

In an almost identical case,[11] decided later in the same month by another New York court, "$10 per cow per year for such violation . . . to be considered as liquidated damages and not as a penalty" was held

. . . not void as being against public policy or in restraint of trade. . . . It was quite necessary that they be assured of the continued patronage of their members in order to justify the association in going to the expense of acquiring or erecting a creamery. It cannot be said

[11] Bullville Milk Producers' Association, Inc. v. Armstrong, 178 N. Y. S. 612 (1919).

that an agreement such as this would tend to restrain trade or stifle competition; on the contrary, it seems to me that it encourages competition by bringing a new creamery into being.

These New York cases evidence the trend then beginning toward a more liberal policy with reference to co-operative organization simply through interpretation of common law principles. Although nothing is said in these cases with reference to the statutes under which the associations were organized, the first antedated the passage of any co-operative law in New York state. While the second might have taken advantage of the Rochdale type of law passed in 1913, such laws contain no specific authorization of collective bargaining pools nor explicit declaration of public policy with reference to such group action. Hence the change is to be attributed to the attitude of the courts rather than to the action of legislatures. Before tracing further this trend toward more liberal interpretation we should go back some years to note what legislative changes had been taking place, as they bear specifically on the restraint of trade issue. This takes us back to the year 1908, when the first decision in a court of last resort favorable to co-operatives on the restraint of trade issue was secured.

II. SPECIAL STATUTES AND THE DETERMINATION OF PUBLIC POLICY

The new line of development began with the tobacco pools of Kentucky, which set up a type of

organization much more aggressive in its effort to control members and their product than anything which had preceded, and using much more drastic remedies to enforce their control. In order to make more sure of their position, the organized tobacco producers had secured the passage in 1906 of a pooling statute (see Appendix M), whose first section read:

> It is hereby declared lawful for any number of persons to combine, unite, or pool, any or all of the crops of wheat, tobacco, corn, oats, hay, or other farm products raised by them, for the purpose of classifying, grading, storing, holding, selling, or disposing of same, either in parcels or as a whole, in order or for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crops separately or individually.

The second section of the law provided that contracts or agreements designed to carry out such purposes "are hereby permitted and shall not, because of any such combination or purpose of said persons, be declared illegal or invalid." When in 1908, therefore, the Kentucky tobacco co-operatives came to court [12] seeking an injunction against defaulting members, the question upon which the court centered its attention was whether this pooling law was constitutional under Section 3 of the Bill of Rights of Kentucky, which declared that "no grant of exclusive, separate, public emoluments

[12] Owen County Burley Tobacco Society v. Brumback, 128 Ky. 137, 107 S.W. 710 (1908).

or privileges shall be made to any man or set of men except in consideration of public service" and the section of the state Constitution requiring the General Assembly "to enact such laws as may be necessary to prevent all trusts, pools, combinations, or other organizations from combining to depreciate below its real value any article or to enhance the cost of any article above its real value." The defense also claimed that the law was in contravention of the Fourteenth Amendment to the Constitution of the United States.

In this case the Supreme Court of Kentucky held that the pooling law was not an improper grant of special privilege, but a proper classification of persons according to their occupation, saying: "This power of selection and classification has been so frequently exercised that the right to do so cannot be considered an open question." As for the Fourteenth Amendment to the Federal Constitution, "this section has been frequently considered by the Supreme Court of the United States, and it has been ruled that it does not deny the state the right to classify and select occupations, trades, and professions." On the second issue the court recognized frankly the intention of the tobacco pools to strengthen their bargaining position and improve prices, saying:

> It is manifest that the real, and in fact only, object of the act was to enable the producers by pooling and combination to obtain better prices than they could get if they sold their crops separately and as distinct

individuals. The right [to] select, grade, store, and hold is merely a means to the accomplishment of the chief end, which is to get a greater price. It would be idle to say that the Legislature intended only that the producers might combine for the purpose of grading, classifying, and storing their crops, and this was the sole purpose of the act; and it was not contemplated or intended that by this process of grading, classification, and storing they should regulate or control the market, and thereby obtain a higher price for the crops than they could command as individuals. It would be equally absurd to say to the farmer that this act only allowed him to grade and classify, but not to fix, regulate, and control the price of the product, when he knows, as must everyone else who reads the act know, that the end to be accomplished was to control, regulate, and fix the price by placing all the crops in the hands of a central agent, with power to hold them until a reasonable and adequate price could be obtained.

With hardly a glance, therefore, at questions of how such action of pools might modify trade competition or technically restrain trade, the court centered its attention definitely on the effects in bringing about a reasonable or unreasonable price. Quoting further from the opinion:

It would seem that . . . trusts, pools, and combinations, the only purpose of which is to obtain a fair and reasonable price for an article, are permitted . . . The act of 1906 does not authorize or permit a pool or combination to enhance the cost of crops above their real value. That is not the proper construction, and if it allowed owners to place the price of crops above their real value it would clearly be a violation of the Constitution . . . If under this act the farmers, associated with the defendant, were combining and pooling their crops for

the purpose of obtaining for them a greater price than the real value, and it should be judicially determined that this was true, the contract entered into in my judgment would be without binding force or effect upon the defendant, although he voluntarily consented to become a member of the society or organization. It could not for a moment be entertained that a contract entered into for the purpose of enhancing the price of an article above its real value would be binding upon the parties to it. Such a contract would not be authorized by the act of 1906, nor would the Legislature have the power to pass an act that would enable or permit persons or classes of persons to do things that are contrary to public policy and that have always met with the severest condemnation of the courts.

While the court's assumption that the "real value" of crops was a simple fact, easy of ascertainment, would hardly command the assent of economists, it is evident that the position of the court was clearly that the mere fact that producers were combining for the purpose of advantageously affecting prices did not *ipso facto* constitute them an organization in restraint of trade, nor was it beyond the power of the state legislature to authorize such associations. In view of the fact that the defendant relied upon the illegal form of the association and "as the record does not show that the plaintiff society is attempting to enhance the price of tobacco pledged to it beyond its real value," the attempt of the grower to evade his contract was disallowed by the court and the validity of the pool upheld, pending such time as it might be shown that its acts rather than its structure were illegal.

The continuance of the co-operative movement in the Burley tobacco field brought another favorable decision four years later, this time in the Supreme Court of Indiana.[13] Here the trial court had held that the association's contract was in restraint of trade and therefore against public policy. On this point the Supreme Court said that "if the contract set out in the complaint can be said to restrain trade unreasonably then it is against public policy and condemned alike by the common law and by the anti-trust statute of Indiana," and continued:

> The determination of what contracts are and what are not against public policy is usually attended with much difficulty, as the term "public policy" will not admit of exact definition. Public policy in one part of the country may or may not be the public policy of another part. Likewise, the public policy of one time may or may not be the public policy of another time. Our complex and changing civilization is especially marked and distinguished by our view of public policy, which is not the same today as it was a decade ago, or as it probably will be a decade hence. Whatever it may or may not be, all authorities agree that public policy in a state is declared and made certain when disclosed by a sustained line of decisions by the judicial branch of government, or by the legislative branch, when it finds definite and exact expression in statutory enactments. And when the public policy of a people is thus crystallized into law, such law will be deemed to be the final work in expressing the popular policy in that behalf.

[13] Burley Tobacco Society v. Gillaspy, 51 Ind. App. 583, 100 N.E. 89 (1912).

Thereupon the court noted that the association was formed under the pooling law of Kentucky, subsequently upheld by the court of last resort in that state, which had "justified its enactment by reason of the situation and circumstances existing at the time of its passage and of which the court took judicial notice." After quoting on this point from both the Brumback case (cited above) and a subsequent case [14] in the same state, the Indiana court concluded:

> While these cases carry the rule of judicial knowledge far, it is clearly the law that courts will take judicial cognizance of the history of the country and of the facts of common knowledge which go to make up such history. To hold that courts do not judicially know that in the year 1909 there was in this country a combination among the manufacturers of tobacco, which controlled the leaf tobacco market, and known as "The Tobacco Trust," would be to impute to courts a lack of knowledge possessed by the public generally. Moreover, the authorities seem to recognize an exception in cases presenting facts similar to the facts averred as judicially recognized in the case before us. Mr. Greenhood, in his work on Public Policy, at page 645, lays down the rule that combinations to raise prices to a reasonable point are valid

[14] "The conditions which gave rise to the act are known of all men. At the time of its enactment, there was but one buyer for the farmers' tobacco. It mattered not how hard he labored, how valuable his soil, or how fine the quality of the crop he raised, he was obliged to accept whatever that buyer might offer. Indeed, in many instances, the buyer absolutely refused to examine his crop or make any offer at all. Instead of the plenty to which he was accustomed, and to which he was entitled, he stood face to face with privation and want. As individuals, the farmers were unable to cope with the situation." Commonwealth v. Hodges, 137 Ky. 233, 125 S.W. 689 (1910).

among men engaged in business which has become ruinous, especially when their operation is limited, in every essential particular.

There is no averment in the complaint that a provision in the contract disclosing that appellant by means of the pool proposed to sell the tobacco of appellee for a sum greater than its true and actual value. As we have seen, all presumptions will be indulged in favor of the legality of a contract, and such presumptions will only yield when its illegal character plainly appears.

In this case, we think it may be admitted that the contract in suit was executed in furtherance of a combination in restraint of trade by the growers of Burley tobacco, the market for which was controlled by a trust. But the purpose of the combination does not appear to be other than to secure a fair and adequate price for their product. We think that such acts could not be held to be in conflict with the morals of the time or to contravene any established interest of society. Public policy does not ask those who till the soil to take less than a fair return for their labor. Public policy safeguards society from oppression; it is not an instrument of oppression.

In other words, the court argued that what the legislature of Kentucky had declared to be the public policy of that state was, under the same set of facts, good public policy for the state of Indiana even in the absence of a similar statutory declaration there.

The year following the Gillaspy case saw another favorable decision on the restraint of trade issue, this time under a maintenance fee by-law, and depending upon a special statute of the state of Alabama. This opinion [15] put the matter on the

[15] Ex parte Baldwin County Producers' Corporation, 203 Ala. 345, 83 So. 69 (1919).

basis of needful financial support similar to the reasoning later employed in the Bullville and Castorland cases just cited.

> The provisions of the Act of 1909 clearly authorized the corporation to enact a by-law to secure from its members by assessment or dues or otherwise sufficient funds for the management of the business affairs of the concern; and we are fully persuaded the methods thus pursued were within the powers of the corporation . . . Members were in fact encouraged in disposing of their products to others if by so doing a better price could be obtained and no penalty was attached to any member for such sale, but merely a 3 per cent charge was fixed upon the gross sales whether to the corporation or outside as a proper amount to be paid by each member for the advantages obtained from the corporation for the services rendered. Under such a state of facts we entertain the view that this by-law does not come within the principle of being in restraint of trade.

It is interesting to note that this opinion cites Reeves v. Decorah Farmers' Co-operative Society at the head of a list of cases considered by the court, but held not to justify any other ruling than the one given. Also, the court gave no apparent weight to the opinion of the Court of Appeals of their own state in the Turnipseed case (1913), but followed a line of reasoning essentially the opposite of that used in the earlier decision. The Baldwin County association covered merely local shipping activities and the issues were thus practically identical with those in the Turnipseed case. The Kentucky tobacco situation, on the other hand, pre-

sented a considerably more extreme situation, involving pooling over a whole region for the definite purpose of advancing market prices. The Kentucky statute likewise, in authorizing such arrangements, went much further than did the Alabama law. Hence favorable decision in the latter case is to be explained only by the attitude of the court, based as it was on a liberal but penetrating analysis of the real nature of this type of association and what sort of arrangements were necessary for its maintenance.

Indeed, this case may be taken as recording the beginning of a change toward more liberal interpretation of general as well as special statutes, and in the application of common law principles to the situations presented by co-operative forms and practices. This is shown by several decisions coming into the record in recent years even in states which had not passed pooling laws. Viewing an exclusive dealing association in the light of its real purpose and demonstrated effects rather than deciding the issue upon an academic view of the potentiality of such an arrangement to limit some individual's private business, the Supreme Court of Washington in 1921 upheld a co-operative cranberry association and its contract. Here [16] the court said that to determine whether a contract is void as against public policy or under state or Federal anti-trust

[16] Washington Cranberry Growers' Association v. Moore, 117 Wash. 430, 201 P. 773, 204 P. 811 (1921).

laws "it is necessary to read the contract in connection with the procedure under it and the result which was produced thereby." In the case under consideration it appeared that the association had improved the product, developed markets, and equalized prices. As to anything savoring of monopoly, the court found:

> The berries handled through the cranberry exchange . . . came in direct competition with Eastern berries as well as with the berries of independent growers. The cranberry association controlled about 2 per cent of the berries produced in the United States, the independent growers 32 per cent, and the American Cranberry Exchange . . . 65 per cent. The berries sold through the selling agency in Portland . . . sold at the market price . . . The contract and the delivery of berries under it not resulting in limiting the production, controlling or fixing the price in any particular market, cannot be said to be void as against public policy or under the constitutional provisions above referred to or under the Anti-Trust [Act].

Two years later the same court reaffirmed this stand in the case of a milk producers' organization [17] formed under the Rochdale law of that state, which, of course, was silent on the collective bar-

[17] Pierce County Dairymen's Association v. Templin, 124 Wash. 567, 215 P. 352 (1923). Certain explanatory phrases employed in the contract of this association and cited by the court are worth noticing in this connection. It set forth "that it may be desirable and expedient for the association, from time to time, in order to secure for the dairyman the largest possible net returns for his milk, to enter into contract or contracts to furnish certain persons, firms, or corporations certain and definite quantities of milk at stated times covering stated periods during the continuance of such contract or contracts; that the association

gaining issue. To the contention that the contract was unenforceable because of its "tendency to create a monopoly in restraint of trade" the court replied:

Looking alone to the provisions found in the articles of incorporation of the association, its by-laws, and the stipulation of this contract, we do not think the contract has the tendency so claimed for it. This corporation having been formed as a co-operative association under statutory authority, for the doing of the very things contemplated in its organization and by the execution of this contract, we think it would require strong, convincing considerations to call for the holding that this contract is so monopolistic in its character as to call for the holding of it to be invalid for that reason. So far as we may concern ourselves with a question of fact as to whether or not it has had that tendency, we are quite clear that the evidence does not show that it has had such tendency. The trial judge made no specific finding on this question of fact, but evidently he was of the same opinion. We think the purpose of the association, as evidenced by its articles of incorporation, its by-laws, and the making of these contracts, and what the association has in fact done, look to the efficient economical bringing of the

can make such contract or contracts only upon the strength of and in reliance upon the strict and faithful fulfillment by the dairyman of the terms of this contract, on his part to be fulfilled; therefore, as an inducement to the association to undertake the performance of the services contemplated by this contract, the dairyman hereby stipulates and agrees that he will not sell or dispose of his said milk to or through any person, firm, or corporation other than the association, without the approval of the association, during the life of this contract; and it is hereby mutually agreed, inasmuch as it is impossible, at this time, to fix and estimate the actual damage which will be sustained by the association in the event that the dairyman should fail to fulfill his agreement to sell his milk exclusively through the association, that such damages are hereby estimated and agreed upon in advance . . ."

producer and consumer of milk close together, and the avoiding of intervening profits to the loss of the producer, rather than to the unlawful controlling of the price of milk to the consumer. We conclude that there was no impediment to the enforcement of this contract because of its tendency to create a monopoly in restraint of trade.

In California the co-operative law of 1909 had not dealt specifically with the restraint of trade issue, but in the same year the anti-trust law of the state was amended to provide "that no agreement, combination, or association shall be deemed to be unlawful or within the provisions of this act, the object and business of whch are to conduct its operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so marketed [etc.]." This provision was cited by the District Court of Appeals in the Anaheim case [18] in 1922 and by the Supreme Court of the state in another favorable decision [19] the following year. The opinion in the earlier case said:

There is nothing in the articles of incorporation of the plaintiff or its by-laws, or in the evidence of its methods, which tends to show that any purpose of the association was to do acts in restraint of trade or produce an unlawful monopoly. . . . It will not be inferred, without proof of the fact, that an organization, the purposes of which appear to be legal and legitimate on their face, is actuated by a hidden design to operate in a way that is prohibited by law.

[18] Anaheim Citrus Fruit Association v. Yeoman, 51 Cal. App. 759, 197 P. 959 (1921).

[19] Poultry Producers of Southern California, Inc. v. Barlow, 189 Cal. 278, 208 P. 93 (1922). This decision is discussed on p. 305.

We have already noted that in Colorado a farmers' elevator seeking to enforce a maintenance clause had in 1918 been held to operate in restraint of trade. This company was presumably organized under the Rochdale type law then on the statute books of the state. It was under a law of the California pattern also adopted by Colorado that the Colorado wheat pool was organized in 1922. The pool adopted a "binding contract" calling for liquidated damages of 25 cents per bushel, as was done by the wheat pools in neighboring states. This arrangement was upheld in the lower court, only to be reversed [20] by the Supreme Court on the following grounds:

> That such contracts are against public policy and void is held by the great weight of authority and, until recently, almost universally. This state has so held Burns v. Wray Company, 65 Colo. 425; Campbell v. People, 72 Colo. 213; Johnson v. People, 72 Colo. 218. . . . The purpose of [the liquidated damages] provision must be determined by its natural and obvious effect . . . which is to permit the present company to control the price of wheat, a necessity of life. . . . It is said contracts in restraint of competition are not unlawful unless unreasonable or harmful to the public, and it is claimed that the present contracts are not harmful but beneficial, but we cannot see that they are less harmful or more beneficent in their tendency than was that in Burns v. Wray Company. If control of the wheat market is beneficent then the present contract is more so than the other, but if harmful it is more harmful. But we have held in the above cited cases that

[20] Atkinson et al. v. Colorado Wheat Growers' Association, 77 Colo. 559, 238 P. 1117 (1925).

it was harmful as a matter of law. The claim of reasonableness, therefore, cannot control us. All these contracts antedated the Act of 1923, Ch. 124, which authorizes such agreements. It cannot be said, then, that such a contract as the present was lawful when made. The Act of 1923 not only in terms makes such contracts lawful but purports to legalize all previous contracts of that sort; that portion of it, however, is retrospective and retroactive and cannot be sustained. Any party who chose could repudiate the contract he did not make.

A similar determination not to relax the rule by interpretation but only in strict accord with legislative declaration is to be observed in Oklahoma. This was demonstrated in several cases [21] involving associations formed under the co-operative law of 1917, which was patterned on the Department bill of the same year. The law required that when exclusive dealing contracts were employed the association must make provision for withdrawal at some specified period during each year. This the association failed to do. The law's provision regarding liquidated damages also was involved. The court held:

Said sec. 13 of the Act provides also that said by-laws may fix an amount as liquidated damages for breach of contract, but it prescribes a condition and basis upon which such liquidated damages shall be fixed, viz: "That

[21] Oklahoma Cotton Growers' Association v. Salyer, 114 Okl. 77, 243 P. 232 (1925). Followed in Carmichael v. Oklahoma Cotton Growers' Association, 117 Okl. 24, 245 P. 598 (1926); Hooven v. Oklahoma Cotton Growers' Association, 118 Okl. 238, 247 P. 39 (1926); and Cunningham v. Oklahoma Wheat Growers' Association, 120 Okl. 19, 250 P. 71 (1926). It is worth noting that three justices dissented from the decision in the Salyer case.

such damages shall be reasonable sums, in amount fairly related to the actual damages ordinarily suffered in like circumstances." The agreement violates this statute, takes away this statutory right by providing a fixed, arbitrary, unconditional lump sum of $5.00 per hundred weight, for all cotton sold to parties other than the association, without reference to the reasonableness of such damages, without provision for determining whether they are reasonable or whether they are fairly related to the actual damages sustained, or fairly related to the actual damages ordinarily suffered in like circumstances.

The constitutionality of acts of this character is also challenged by defendant as being in restraint of trade . . . but the argument on this question is in the main directed toward the provisions of the act of 1923, which, as we have heretofore determined, are not controlling and not directly involved in this case, and, not being necessarily in the case, it would be only dictum to say whether or not they are constitutional. . . . It is therefore unnecessary, perhaps would be improper, to pass on the constitutionality of the act of 1917, for the reason that the association is not here seeking to enforce the provisions of said act itself, and thereby relying upon its constitutionality, but it is seeking to violate said act and to suppress rights specifically given by said act.

In a long line of cases, however, many of them prior to this Oklahoma decision, the restraint of trade issue under statutes similar to the Oklahoma law of 1923 has been adjudicated. Detailed examination of these cases will be made in the following chapter.

CHAPTER XV

RESTRAINT OF TRADE UNDER RECENT CO-OPERATIVE MARKETING ACTS

THE first reported decision covering the restraint of trade issue under the new type of legislation was handed down by the Texas Court of Civil Appeals late in 1922.[1] The court disposed very briefly of the claim that the binding contract constituted the association a combination in restraint of trade, saying:

> The terms of the act dispose of the claim that the contract in question is in contravention of our anti-trust laws. By section 26 it is explicitly provided:
>
> "No association organized hereunder shall be deemed to be a combination in restraint of trade or an illegal monopoly or an attempt to lessen competition or fix prices arbitrarily; nor shall the marketing contracts or agreements by the association and its members or any agreements authorized in this act be considered illegal or in restraint of trade."
>
> We know of no constitutional reason why the public policy of the state may not be so declared. A similar act with like purposes has been passed by the federal Congress.[2]

[1] Hollingsworth et al. v. Texas Hay Association, (Tex. Civ. App.) 246 S.W. 1068 (1922).

[2] This presumably refers to the Capper-Volstead Act, passed earlier the same year. It is not, however, a very accurate characterization of that statute. Compare p. 259.

Early the following year the Supreme Court of Oregon, construing certain amendments added in 1921 to the existing Oregon co-operative law to bring it into substantial accord with the "standard marketing act," said [3] briefly: "The statute does not operate to create a monopoly," and then passed on to consider the contract drawn in supposed conformity with the statute. The defendant contended that the contract was unlawful "in that it is a contract for a combination or conspiracy in restraint of trade and that its enforcement would create a monopoly." To this the court responded:

> On its face the contract is legal. . . . If the defendant, when sued for a breach of it, had desired to attack its legality he should have both alleged and proved its illegality, and in his proof he should have shown how and why it was unlawful. Although the defendant, in order to raise this question, was required to do both of these things, he has done neither. Here we have a valid contract, the making of which was specially authorized by statute . . .

This was followed on April 12, 1923, by a lengthy opinion rendered by Chief Justice Walter Clark of the Supreme Court of North Carolina,[4] which has since been widely and approvingly quoted and apparently accepted by other courts as stating sound principles.[5] This opinion deals broadly with the

[3] Oregon Growers' Co-operative Association v. Lentz, 107 Ore. 561, 212 P. 811 (1923).

[4] Tobacco Growers' Co-operative Association v. Jones, 185 N. C. 265, 117 S.E. 174 (1923).

[5] "This opinion always impressed me as utterly lacking in judicial tone. The late jurist who wrote it was noted as holding

co-operative system, which is characterized as "the most hopeful movement ever inaugurated to obtain justice for and improve the financial condition of farmers and laborers." It upholds the membership contract in all regards, and also the marketing act of 1921 under which the tobacco growers' association was formed. Construing the clause "no association organized hereunder shall be deemed to be a combination in restraint of trade or an illegal monopoly or an attempt to lessen competition or fix prices arbitrarily, nor the marketing contract or agreement between the association and its members nor any agreement authorized in this act be considered illegal or a restraint of trade," the court observed:

> The constitutionality and validity of this statute are determinative of this controversy and in effect cover the entire subject of this litigation . . . It is clear there is nothing in this statute to enable the producers to combine to sell their products at a profit beyond what would be a fair and reasonable market price. Indeed this would be impossible on the part of the producers as only a part of them would in any event belong to such an organization; whereas the manufacture of tobacco being in comparatively a few hands, the buyers could combine as they have done for many years, in a so-called "gentlemen's agreement" to fix the price which would be paid for the raw product and agree in the same way upon a price for the manufactured product with the well-known result that the producers of tobacco, the farmers, have received the bare cost of production in this artificial market and

that the courts had little or no right to declare statutes unconstitutional." J. G. Mitchell.

not always that, while the combination of tobacco manufacturers have accumulated vast fortunes.

In view of the necessity of protecting those engaged in raising tobacco against the combination of those who buy the raw product at their own figures and sell it to the public at prices also fixed by themselves, this movement has been organized. By a careful examination of all the provisions of the act under which the Association is acting, it will be seen that every precaution has been taken to insure that it will not be used for private gain . . . but to protect the tobacco producers against oppression by a combination of those who buy and not to authorize, and does not empower, those who produce the raw material to create a monopoly in themselves.

Indeed it seems to us plain that the plaintiff under the provisions of its charter is not and never can become a monopoly for many reasons: (1) As a corporation of North Carolina the moment it should become dangerous to the public, if that were possible under the terms of its charter, the General Assembly can at any time repeal its charter; Constitution, Article VIII, Section 1; and the courts will intervene to prevent it becoming a monopoly. (2) The plaintiff has neither capital stock nor surplus; nor credit except as given it by the statute and this latter may be withdrawn at any time. It is wholly dependent upon its ability to borrow in large sums which is necessarily under the control of the Federal Reserve Banking system and the moment it shall deny credit to the plaintiff its sufficiency would be destroyed. It can borrow from the Federal Reserve system, which is a function of the Government only on such terms as that Board deems consistent with the public welfare and that Board will not permit hoarding or monopolizing by the plaintiff . . . In May, 1920, when the War Finance Corporation refused credit for the export of cotton, because cotton was scarce and a cotton famine was threatened, there resulted a drop in cotton of 30 cents a pound in six months. Therefore were the plaintiff to attempt to monopolize the sale of tobacco, not

only would it fail to control its sale by the large numbers of producers who are not members of the organization, but it would be faced with the power of the General Assembly to repeal its charter and to put it into the hands of a receiver like the proposal in 1893 to abolish the Farmers' Alliance Business Agency; and it would be denied the privilege of borrowing from the Federal Reserve bank or any of its correspondents.

It would be subject to the visitorial powers of the Secretary of Agriculture under the anti-trust laws and finally it would be confronted with the huge increase in the acreage devoted to tobacco and by the holding off from the market the normal production of any one year, the result would be the selling of two crops within a single year. As was well said by Mr. Pou, one of the counsel for the plaintiff, "these conditions make it physically, economically and financially impossible for the plaintiff to become a monopoly."

The plaintiff will continue to exist only if it provides for a normal, orderly marketing of the tobacco crops and by putting on the markets of the world annually the production for that year. Its sole purpose is by an orderly marketing of the crop to make large saving and to secure to the producers a fair and reasonable price therefor without increasing the price the consumer will pay for the manufactured article. The sole object of the Association is to protect the producer of the raw articles from depression in the price by the combination of the large manufacturing corporations controlled by a few men who can at the same time not only decrease the price to the producer, but can increase it at will to the consumer and thereby accumulate in a few hands sums beyond computation. The Co-operative Association purposes to eliminate unnecessary expenses in selling and to prevent artificially forced reduction in the price paid to the producers. Instead of creating a monopoly, the object is by a rational method of putting the raw product on the market from time to time as there is a legitimate demand for its manufacture, and by the

extension of credit to farmers to enable this to be done, to prevent a monopoly of the tobacco industry by those who manufacture it.

The defendant contends that the charter and contract contained unusual provisions restricting the rights of the members; but in the first place every member becomes so voluntarily. Each grower of tobacco has the privilege of joining or not as he sees fit and no one else can do so. The terms of the statute and the contract as set out in this record are plain and there is nothing concealed.

It is also argued that the co-operative marketing system is a detriment to the public, but no citizen, not a member, has seen fit to intervene upon an allegation that the public has been injured. No person has come into court and said that he has been deprived of any rights and the courts will only hear those who make such assertion upon the proper proof.

While certain of the expressions employed by the learned Chief Justice in dealing with economic issues strike the economist as somewhat extravagant, the vigorous statement of the impossibility of actual monopoly is in refreshing contrast to the timorous attitude of certain of the courts discussed in the preceding chapter. The general position in support of the law and the type of contract which it authorized was rapidly adopted by other states [6] as the progress of the "commodity marketing" movement stirred up litigation in many parts of the country. Two months after the decision in the Jones case the Supreme Court of Kansas in an injunction

[6] Reiterated by North Carolina in Tobacco Growers v. Battle, 187 N. C. 252, 121 S.E. 631 (1924).

case,[7] in which the "appellant [did] not make much complaint about the validity of the statute except as to section 16," indicated its general willingness to follow decisions of the tenor of the above by observing incidentally:

> Under similar statutes, where questions have been raised, it has been generally held that an organization of this character is not an unreasonable combination in restraint of trade, neither does it create an unlawful monopoly in the sale of such products.

Subsequently, when the same association was attacked more directly on this issue, the court in another favorable opinion [8] elucidated its position more fully:

> Defendant contends the evidence shows the association is an unlawful combination to restrain trade and create monopoly. The evidence consists of the association's by-laws, the marketing agreement, a statement by a man who was soliciting members that they would keep wheat off the market and raise the price, and the fact that at the time of the trial the association had in contemplation a working agreement with a similar Kansas organization. Defendant makes a statement in his brief to the effect that the contemplated arrangement has been effected. What it is he fails to disclose, except to characterize it as an "interlocking agreement." Plaintiff meets the statement by flat denial of its truth, and the court is not inclined to wreck the association because of a membership solicitor's interpretation of its purposes.

[7] Kansas Wheat Growers' Association v. Schulte, 113 Kan. 672, 216 P. 311 (1923).

[8] Kansas Wheat Growers' Association v. Charlet, 118 Kan. 765, 236 P. 657 (1925).

Defendant says the court found the contract was made for the purposes of obtaining wheat, keeping it off the market, and putting it in a pool to raise the price of wheat. What the court did was to describe the association as an organization of wheat growers associated together to pool their wheat and withhold it from the market until such a time as the association desired to sell. The court made no finding of purpose or practice, and, in view of the minute findings which it did make, could have had no competent evidence before it of purpose or practice contravening the great public policy which the Legislature sought to promote by the Co-operative Marketing Act.

Defendant contends the Co-operative Marketing Act contravenes the Constitution of the United States because it permits a monopoly which would otherwise be condemned by the anti-trust statute, for the benefit of a favored class. The case of Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679 is cited. One flaw in the contention consists in the fact that the Co-operative Marketing Act does not create monopoly of the kind denounced by the Anti-trust Act. Wheat Growers' Association v. Schulte, 113 Kan. 672, 216 P. 311.

Only two days after the handing down of the favorable decision in the Schulte case the Supreme Court of Mississippi took a similar stand, its opinion [9] affording an interesting discussion of the question of strict construction versus liberal interpretation of anti-trust legislation. It was there said:

If our anti-trust statute is to be applied literally, perhaps this marketing contract comes within its pro-

[9] Brown v. Staple Cotton Co-operative Association, 132 Miss. 859, 96 So. 849 (1923).

visions. Every member of the appellee association by this contract (which is not only a contract with the association but with each member thereof) has placed the control to *some extent* of the staple cotton produced or controlled by them in the hands of appellee. Therefore the question is whether our anti-trust statute should be construed according to its literal terms regardless of the results, or whether it is to be construed in the light of reason and with the view of promoting the public welfare.

Section 198, Constitution 1890, commanded the Legislature to "enact laws to prevent all trusts, combinations, contracts, and agreements *inimical to the public welfare.*" (Italics ours). In obedience to the command we have chapter 145, Code of 1906 . . . Putting the question differently, is this contract to be condemned even though it be not inimical to the public welfare? We think this question is answered in the negative by the following decisions of this court: . . . In discussing this question in the Searles Case, supra, the court said that all combinations or contracts without regard to their purpose, intent, or effect by which the control of business is placed within the power of trustees or other persons than the contract parties, were not trusts in the meaning of section 4437, Code of 1892, chapter 88, Laws 1900, defining trusts and prohibiting contracts in restraint of trade; that the test of a trust and the essential of its existence is that the contract or combination be, on account of its actual results, obnoxious to the public policy, or be in itself and its necessary effect inimical to the public welfare.

. . . The Legislature must be given credit, if the language of the statute in question will permit, of legislating in the public interest. It is inconceivable that it was intended by our anti-trust statute to condemn any and all contracts between two or more persons which might have the effect to hinder the freedom of trade even to the very smallest extent. Such a construction, as it will be seen at once, would lead to absurd results. It would

destroy to a large extent the public welfare instead of promote it. The plan of appellee association considered in connection with the marketing and association contracts between appellee and its members does not undertake to fix prices of long staple cotton. The outstanding purpose is to promote intelligent warehousing and marketing of such cotton. Appellee association goes out in the open market and hunts purchasers who compete against each other. It is simply a sales agency or a plan for group marketing. It is true it has large powers, but not even *all* the power at one end of the bargain. One of the main purposes is to prevent long staple cotton growers from being forced on account of their financial necessities to dump their cotton on the market during the three or four months of harvesting time. A steady market and a reasonable price are central ideas in the plan, a continuous market for the producer the year round, instead of only for three or four months. Another object is to save expense to the producer by means of having large quantities of long staple cotton stored, classed, and marketed by appellee association instead of by thousands of producers, who know nothing about classing cotton. Appellee association under the arrangement is able to sell direct to the mills as well as to others. Mississippi is almost exclusively an agricultural state. Its chief product for market has always been, and probably always will be, cotton. It would be hard to conceive of how a steady market and a reasonable and profitable price for cotton to the producers would be inimical to the public welfare in this state. On the contrary, it would appear that not only every cotton producer in the state would be benefited thereby, but also every other person engaged in any kind of business whatsoever.

The basis upon which claims were made that a co-operative association was monopolistic was set forth and answered in greater detail than in any

of the preceding cases in connection with the Wisconsin tobacco pool, which late in 1923 was declared [10] not to be a monopoly or unlawful combination in restraint of trade. It had been so charged on the following grounds:

(1) The contract is not to take effect until 75 per cent of the growers of tobacco in Wisconsin signed similar contracts; (2) the provision in the contract that the member will pay to the association the sum of 5 cents per pound for each pound of tobacco produced, but not delivered by him according to the provisions of the contract; (3) that the admitted purpose and conduct of the plaintiff was to combine at once 100 per cent of the growers in Wisconsin, and obtain a complete monopoly; (4) that the Wisconsin tobacco crop is peculiarly subject to monopolization, because of its distinctive quality; (5) that the plaintiff pool established a price upon its crop which was a monopoly price, as appears by the fact that the price once fixed by the pool was to continue for the whole season, and the prices fixed by the pool were regarded by it, due to its control over the market, as the market price, and anything beyond was classed by it as in excess of the true market price so fixed; (6) that the plaintiff acquired such monopolistic control over the tobacco crop of Wisconsin as to be able to disorganize, in its first season, the entire distribution and marketing system of tobacco in this state; and (7) that the plaintiff acquired such monopolistic control over the tobacco crop in Wisconsin as to be able to exercise monopolistic discrimination in the distribution of the Wisconsin tobacco crop among the buyers of tobacco.

Assuming "these several propositions as verities" even though "not without dispute in the evidence,"

[10] Northern Wisconsin Co-operative Tobacco Pool v. Bekkedal, 182 Wis. 571, 197 N.W. 936 (1923).

the court justified the statute and the association, saying:

> It is not to be denied that the public policy of the state with reference to such combinations and agreements is within the control of the Legislature . . . If in the course of time changing conditions should give rise to economic views and public opinion, wiping out the prejudice hitherto entertained with reference to such combinations, and they should come to be regarded as beneficial rather than injurious to the public interest, there is no doubt of the power of the Legislature to completely reverse the public policy of the state with reference to such combinations and agreements and to promote rather than suppress the same. So, also, if the Legislature should conclude that some combinations are injurious while others are beneficial to the public interest, no reason is perceived why the injurious combinations may not be prohibited and the beneficial combinations encouraged, due regard being had of course to the legal requirements concerning proper and germane classification.

Pointing out by italics that the first section of the co-operative law of the state provided that "*any number* of adult persons, not less than five . . . may organize as a co-operative association [etc.]," [11]

[11] "The court certainly made a big jump when it said that 100 per cent could join the association and this be legal because the co-operative law provided that 'ANY NUMBER OF PERSONS may organize.' This phrase 'any number' refers simply to the number of persons who may act as incorporators, namely, any number not less than five. If the court is right in basing its conclusion on this phrascology then we have no anti-trust law at all because the *general corporation law* contains quite similar language when it says that 'three or more persons' may form a corporation. If the reasoning of the Bekkedal case is right, then three or three thousand more people can form a corporation under the general law and still raise no question as to a viola-

and that the law authorized "every provision of the contract here in question which it is claimed constitutes a restraint of trade," the court ruled:

This legislation, being enacted subsequent to the enactment of our general anti-trust statutes, must be considered as modifying the scope of the former, and the validity of plaintiff's contracts, or the effect of their operation so far as they constitute a restraint of trade, is not to be tested by the provisions of section 1747e, or court decisions condemning contracts under similar legislative provisions. This legislation providing for the organization of co-operative associations manifests a clear purpose on the part of the Legislature, not only to authorize, but to encourage, co-operative effort along the lines to which the legislation is made applicable, and to legalize practices which no doubt were of questionable validity prior to the enactment of such legislation.

. . . We therefore hold that the validity of the plaintiff organization and its operations must be tested, not by the former public policy of this state with reference to combinations and agreements in restraint of trade, as declared by section 1747e, but by the provisions of the co-operative association statutes. So far as the contract is concerned, it seems to be in conformity with those provisions. The statute specifically provides that *any number* of persons may organize as a co-operative association. This language negatives any legislative purpose to limit the number of persons that may so organize, and the fact that 75 per cent or even 100 per cent of the tobacco growers of the state affiliated with this association does not render its organization illegal or its operations unlawful. It may be and probably is

tion of the anti-trust statute. The short answer is that the court was straining to reach the correct decision and went too far in finding a basis for predicating that decision." Alvin C. Reis, formerly Assistant Attorney General for Wisconsin.

true that the organization and operation of this association had a very serious effect upon defendant's business in the various respects above set forth, but it is to be remembered that the very purpose of the legislation was to bring about a different system of marketing, which must of necessity injuriously affect middlemen (and such is the Bekkedal firm). The effect of the operation of such associations upon business in general cannot be considered in determining the legality thereof or their operations, because the public policy which formerly condemned them now encourages their existence and operation. If they have no effect upon business as heretofore existing and conducted, then their existence and operation, as well as the legislation promoting them, is futile and to no purpose . . .

The frank recognition that it is not the purpose of courts merely to maintain the existing status quo furnishes an interesting contrast to the reasoning of the Iowa court in the Decorah case. In other words, the Wisconsin court, manifesting a lively appreciation of the homely fact that "you can't make an omelet without breaking eggs," aligned itself with those who believe there is greater public advantage in testing out the nutritive value of the omelet than in maintaining the sanctity of eggshells. In this, the Wisconsin opinion seems much more in harmony with the modern trend than the decision ten years earlier by the Iowa court. In a supplementary opinion denying the motion for rehearing of this case the court likened this trend to that which had taken place in "governmental attitude toward the collective efforts of laboring men, which evolution is clearly pointed out in the dissenting opinion of Mr.

Justice Brandeis in Truax v. Corrigan." After this reference to the analogous situation in labor organizations, the court continued:

That there is an inherent difference with reference to the resulting effect to society between a combination of a strong and powerful few, who are able to get together and exercise a complete control of a particular industry or commodity essential to social existence, and a combination of farmers, each weak in his individual strength and power, numbering into the millions and scattered far and wide, is reasonably apparent. The former combination is small, compact, powerful. The inevitable tendency, and too often the plain result, is oppression to society. Any combination of the latter is necessarily weak and impotent, so far as securing a unity of control and action sufficient to result in suppression is concerned. The most that is hoped for from co-operative organizations on the part of the latter is slight improvement in the condition of the agricultural classes, a stimulus to more intelligent effort, and encouragment to carry on in a line of endeavor that is essential to human existence. A perusal of the Co-operative Marketing Law dissipates any thought that it has for its fundamental purpose the accomplishment or promotion of monopoly. Its dominant purpose is to promote the welfare of its members by stimulating co-operative effort. The law is rather carefully drawn, and many of its provisions may be cited, disclosing a legislative effort to restrain the results of the law to the purposes sought to be accomplished. It is not a law to be availed of by those harboring monopolistic purposes. . . . It is obvious that great and oppressive combinations of capital, constituting the real evil which has caused the enactment of stringent anti-trust legislation, would not find this law very helpful, and that those having monopoly as their dominant purpose would not choose to take advantage of this law.

The continued insistence of courts today upon the proving of actual restraint of trade or monopolistic practices rather than the hypothetical power to do these things was again shown in the decision of the Kentucky Court of Appeals on a tobacco pool case [12] near the close of 1923. The court said: "There is neither allegation nor proof that a monopoly actually has been created or that trade has been restrained by appellee; hence it is clear the contract cannot be annulled as violative of the anti-trust provisions of either the Sherman Act or the common law now in force in this state." It thereupon proceeded, however, to confuse two issues by linking with the above observation as to the actual operation of the contract the comment:

> Indeed, the Clayton Amendment of the Sherman Act expressly exempts agricultural and horticultural organizations instituted for the purpose of mutual help and not having capital stock or conducted for profit from anti-trust provisions . . . Hence the Sherman Act as amended is itself expressive of a change in the public attitude and policy toward agricultural and horticultural pursuits in relation to other business activities, and a recognition of a necessity for the public welfare of permitting organization among such citizens to enable them to meet justly and without undue advantage the conditions they encounter in necessary trade relations with other citizens, or rather groups.
>
> The fact that other productive groups can, do, and for many years have marketed their wares as groups, and not as individuals, and that they are and have been enabled

[12] Potter v. Dark Tobacco Growers' Co-operative Association, 201 Ky. 441, 257 S.W. 33 (1923).

through group organization or "gentlemen agreements" to regulate the distribution and stabilize the prices of their products, is a fact known of all men, which can neither be denied nor blinked by the courts; as is also the fact that farmers, if unorganized, necessarily act as individuals and not as groups in marketing their products, resulting in "dumping" by the farmers, distribution by speculators, an unconscionable and uneconomic spread between producer and consumer in the necessities of life, and an inevitable demoralization of basic economic conditions, to the hurt directly or indirectly of every citizen. With a clear recognition of this fact borne in upon the public conscience by the threatened economic collapse of the farming industry indispensable to public welfare and national stability, if not national existence, an enlightened public opinion unmistakenly demands that farmers be permitted to organize for the marketing of their crops, not merely for their own protection, but for the public good.

We shall have occasion later to discuss further the nature of exemption conferred by the Clayton Act, but the point here is that the Kentucky court definitely expressed itself on the change of public policy resulting from the recognition of public interest under existing economic conditions.

The Kentucky decision was shortly followed by a generally similar one from the Supreme Court of Tennessee.[13] Again the court examines carefully the actual operation of the co-operative and the understanding of its purposes and powers by those in responsible charge. It quoted the testimony of the General Manager that the reason for insisting

[13] Dark Tobacco Growers' Co-operative Association v. Mason, 150 Tenn. 228, 263 S.W. 60 (1924).

that two-thirds of the tobacco acreage of the territory be contracted to the pool was to "control the crop," but that "the purpose and intent was to maintain a fair, uniform price that would be . . . a fair profit to the grower." To the questions, "The association was organized for the purpose of fixing the price?" and "That is why you wanted a majority of members, isn't that so, so that you could do it?", the manager had answered in the affirmative, and on this testimony the defendant had relied to establish the fact that the association was an illegal trust or combination. The court, however, after listing the acts which make a combination illegal under the Federal anti-trust laws, ruled:

> Complainant is not shown to have been guilty of any of these acts. The mere fact that complainant is large and powerful, and may in the future be guilty of some one or more of these acts, does not render it an unlawful combination or trust. In United States v. United States Steel Corporation . . . it was held that mere size and mere possibility of oppression or other illegal act does not even tend to prove the illegality of a corporation. In that case the court said:
>
> "The corporation is undoubtedly of impressive size and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law and the law does not make mere size an offense or the existence of unexerted power an offense. It, we repeat, requires overt acts, and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition nor require all that is possible."
>
> . . . Unless facts are shown which establish that complainant has been guilty of one or more acts inimical in interest to the public (such as the acts mentioned in the

case of United States v. Keystone Watch Co., supra), it cannot be declared an unlawful combination.

Our conclusion, therefore, is that the contract sued on is not violative of the Sherman Anti-Trust Law. Nor do we think it is violative of the Tennessee anti-trust law . . . In the cause under consideration the facts do not establish . . . a plan or arrangement [which] tended to impair competition and to enhance prices to the injury of the public. In fact, the proof shows that the price fixed and maintained by complainant for the tobacco handled by it was lower than the price paid by buyers for tobacco outside of the association.[14]

When the co-operative law of Georgia came before the Supreme Court of that state and was upheld, the Chief Justice rendered an opinion [15]

[14] This opinion, like several others handed down by state supreme courts, puts much emphasis on Federal Supreme Court decisions in which actual results rather than potentialities were made the test of reasonableness. In this connection, however, it will not do to lose sight of the recent decision in United States v. Trenton Potteries Company 47 Sup. Ct. 377 (1927), which says: "The reasonable price fixed today may, through economic and business changes, become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of public relations dependent upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies."

[15] Harrell v. Cane Growers' Co-operative Association, 160 Ga. 30, 126 S.E. 531 (1925).

specially concurring for the purpose of discussing at considerable length the restraint of trade issue which he felt had been evaded in the principal opinion. Accepting the caption of the act as truly expressing its purpose not "to 'defeat and lessen' competition between dealers or sellers of agricultural products . . . but to foster agriculture by providing a stable market, preventing speculative fluctuations, and enabling the agricultural producer to sell his crops by degrees, instead of being forced by his necessities to throw the product of his labor in bulk upon a depressed (because overstocked) market, creating thereby a condition which will not lessen the price to the consumer, but only enable the speculator or middleman to reap a profit which justly belongs to the producer," the court turned to a consideration of the contract, saying:

> Does the Co-operative Marketing Act or the contract submitted in this case "have the effect," or is it "intended to have the effect," to encourage monopoly? A mere statement of the facts of this case shows that it cannot create a monopoly. The Cane Growers' Co-operative Association, which is the defendant in error in this case, covers only a portion of Southwest Georgia, and the agreement is dependent upon its controlling or receiving only 25 per cent of the area cultivated in cane. When we consider and compare the area embraced by this association with the larger areas upon which sugar cane is grown in other states, and especially in the state of Louisiana, it is apparent that it would be impossible for the incorporation and operation of the defendant in error to create a monopoly in syrup. Prima facie a law is constitutional, and it should not be declared un-

constitutional unless it appears beyond any reasonable doubt to be unconstitutional. Under this rule, if the Cane Growers' Co-operative Association, whose headquarters are at Cairo, Ga., may create a monopoly in the future, the judge correctly granted the injunction until the facts could be determined and submitted to the court by the verdict of a jury. Prima facie the contract was not intended to have the effect of creating a monopoly, and there is no evidence submitted in this record to show a contrary intent. The fact that it appears from the defendant's own answer that all syrup delivered by the defendant and other members of the association had been sold in the ordinary course of trade disposes of the contention that there was intent to create a monopoly, in the absence of any evidence that the association had bought and resold any syrup other than that produced by its own members.

The next case [16] in which a court of last resort expressed itself on the restraint of trade issue takes us from the Southern states to Minnesota, where, however, the co-operative movement in its milder and more local forms had appeared early and been rather widely developed. Expressing its view that the language of an enabling act "must be liberally construed for the purpose of promoting its object," the court found the association not to be a monopoly nor to operate in restraint of trade, its findings being based on broad grounds of public policy.

It is for the interest of our social, moral and financial welfare that the producers in our state be able to materially succeed, so that they may enjoy and be inspired by

[16] Minnesota Wheat Growers' Co-operative Marketing Association v. Huggins, 162 Minn. 471, 203 N.W. 420 (1925).

reasonable success and achievements, and thereby be the better enabled to properly carry on the duties of citizenship. It was clearly to this end that this law was enacted. About three-fourths of our states have now enacted such laws. Co-operative associations are favored by our laws.

The Legislature has surrounded this law with every safeguard against it possibly resulting in a monopoly, and if its declared lawful purposes should, by unscrupulous officials, be diverted into those illegal transactions, which would subject it to the assault now made upon it, its immediate death would be certain. The law is purely one of expediency, and to better the economic condition of the producers. This statute makes the association possible. The association frees the market, makes it more open, less one-sided, less subject to manipulation and monopoly control on the part of those who deal in the commodities. It aids and harmonizes with this constitutional provision, which is aimed at those who hoard and speculate in food products, and who interfere arbitrarily and artificially with the natural flow of commerce in such products. It offers a plan as a basis for hope that the market may be stabilized and protected from fluctuation incident to an entire year's crop being dumped upon the market within a period of 60 days, and thereby demoralizing the market in the consequent fluctuation in price, which, in practice, is detrimental to the producer and of little benefit to the public. There is nothing in the organic law of the association that indicates that its purposes are in any way antagonistic to the Constitution or to Section 10463, G. S. 1923, enacted pursuant thereto, or the spirit and intent of the Co-operative Marketing Act. In fact, all the wheat owned by the members is sold upon the markets in open competition with dealers. . . . The agency can do little more than a business-like farmer, who is financially able to choose his market. By reason of having credit, it may do more than the farmer whose finances will not permit him to wait for a satisfactory market. It may, perhaps, by selling in large

quantities, sell to better advantage, but no better than any other dealer or sales agency with ample capital. The association makes no effort to do anything that the individual member might not legally do for himself. We see nothing in the organization, if carried out in the spirit and intent in which the law was passed, to infringe upon the constitutional provisions. . . .

We do not say that this organization like any other corporation, association, or individual may not violate the law. It may. If so, it may be punished the same as all other persons or corporations who transgress. These persons come both in the name and intent of an open, free, and unrestricted market. They seek the privileges of such in equal competition with dealers. They ask for nothing more. The articles of association, by-laws, and the statute under which it is organized proclaim its legality. Every provision of the contract which is pointed to as an element of the alleged act constituting a restraint of trade is authorized by the statute. The statute does not authorize anything forbidden by the Constitution. The element that puts a monopoly under the ban of the law is that it tends to prevent competition and enhances the price of the commodity involved, or deteriorates quality or service and impoverishes the competitor, and these characteristics are absent in plaintiff's scheme of organization. The divergent opinion in this difficult field of legislative action should admonish us that we must not close the door to experiment within a law so surrounded by governmental watchfulness and control. . . .

It is certain that those who might wish to monopolize the market would never adopt this law for their instrumentality. . . . We see no opportunity in the lawful performance of the corporate duties of the association to interfere with or restrict the freedom of the markets, unless it may be said that this results from holding wheat to sell on a satisfactory market. Each farmer has this privilege. We see no reason why, under the restrictions imposed by the law, this association, as a selling agency,

should not have the same privilege in this respect. If, technically, there is any such interference or restriction in this conduct, it is insignificant, and no such interference or restriction resulting from a law of this character should have judicial recognition, unless the result thereof is detrimental to the public interests. . . . The record fails to show such, and, it being equally silent as to any effort toward fixing prices, limiting production, controlling the market, or impoverishing competitors, there is no monopoly.

There is no justification for the suggestion that an orderly, systematized, co-operative marketing authorized by law, to prevent a sacrifice of the farmer's products and to realize a reasonable profit, has any analogy to financial combinations in restraint of trade, which have at times tended to prevent the farmer from realizing a fair profit and a decent living. In fact, this co-operative measure may have more tendency to avoid monopolies by others than it does to create a monopoly by the limited number of farmers who will join it. . . .

In Alabama the Court of Appeals' decision in the Turnipseed case had already been superseded by Baldwin County Producers' Corporation. This was under the non-stock law of 1909, but might be considered as paving the way for a favorable decision whenever the new co-operative marketing act should come before the Supreme Court. This occurred in 1925, and the court rendered a favorable decision,[17] ruling that the legislature had full authority to declare the public policy of the state provided merely that it should not "offend any inhibitory provision of the Alabama Constitution."

[17] Warren v. Alabama Farm Bureau Cotton Association, 213 Ala. 161, 104 So. 264 (1925).

This the Co-operative Marketing Act did not do, since the association formed under it "has no tendency to create any scarcity of cotton either by discouraging its production or unreasonably withholding it from the market." The court expressly recognized that this was a stronger type of membership control than that involved in the Baldwin County case, but not detrimental to the public interest nor an unreasonable restraint of trade. Commenting on the uniformly favorable decisions in other states where this type of co-operative marketing association was involved, the court said:

> Their origin and growth are unquestionably founded upon a pressing economic necessity . . . As a matter of fact, while some of the fundamentals of public policy will probably remain unchanged through all the ages, public policy is generally affected by the changing values of expediency, and hence a public policy which in one age prescribes certain conduct as injurious to the public welfare may in a later age, under changed economic and social conditions, wisely and justly tolerate, if not encourage as beneficial, the identical conduct.

The Nebraska Supreme Court [18] in its turn found the modern law, association, and contract not to be violative of anti-trust laws, but calculated rather to furnish "a simple, businesslike scheme of those engaged in wheat growing to advantageously handle and market their products, and this without encroachment upon the rights of others."

[18] Nebraska Wheat Growers' Association v. Norquest, 113 Neb. 731, 204 N.W. 798 (1925).

Early in 1926 the Louisiana Farm Bureau Cotton Growers' Association came before the Supreme Court of that state seeking to compel specific performance of one of its contracts. While the court released the defendant from his obligation to deliver, this was because the cotton was held not to be his property under the type of landlord-tenant relation existing. As to the claim that the statute under which the association was formed was unconstitutional as being a combination in restraint of trade, the court said: [19]

> The Act apparently does not contemplate any monopoly to corner the market, but merely permits associations organized under it to handle cotton produced or controlled by its own members solely upon a co-operative marketing plan or basis. . . . It is therefore incumbent upon defendant to prove that a monopoly has been created or that trade has been restrained by plaintiff association in order to annul the agreement signed by him. This the defendant has failed to do.

Turning now to the northeast section of the country, it may be observed that there had not been in the past any particular tendency there to attack co-operative arrangements as combinations in restraint of trade. The Castorland and Bullville cases had announced a liberal principle prior to the adjudication of any cases under the new type of co-operative law which has recently been enacted in Maine, New Hampshire, New Jersey, and in

[19] Louisiana Farm Bureau Cotton Growers' Co-operative Association v. Clark, 160 La. 294, 107 So. 115 (1926).

modified form in New York. During the past year an injunction and specific performance case [20] has been disposed of by the Supreme Court of New Hampshire in a manner indicating acceptance in that jurisdiction of the general principles of the exclusive-dealing type of co-operative even though the particular organization had been formed prior to the enactment of the new statute. The court seemed to find nothing to take exception to in the fact that the association's plan contemplated the signing of 75 per cent of the milk producers of the territory under a binding contract, and indeed went somewhat out of its way to give its views on the restraint of trade issue as follows:

> In view of the fact that a further hearing must be had, the question raised in argument whether the contract is opposed to public policy has been considered. Co-operative marketing agreements, containing the essential features of the contract here considered, have been recognized in many of our states as a legitimate means of protecting its members against oppression, of avoiding the waste incident to the dumping of produce upon the market with the consequent wide fluctuations in prices and of securing to the producer a larger share of the price paid by the consumer for his products. . . . From year to year the co-operative idea in marketing has been assuming wider scope and greater economic importance. Public approval of such co-operative organizations is evidenced by the adopting of enabling legislation in more than two-thirds of the states, including our own, as well as by the Congress. . . . Such

[20] Manchester Dairy System, Inc. v. Hayward, — N. H. —, 132 A. 12 (1926).

legislation has received liberal construction by the courts. . . . No sufficient ground appears from the record for holding that the contract here under consideration is contrary to public policy.

Later in 1926 the Burley Tobacco Growers' Association came under the scrutiny of the Supreme Court of Ohio. The favorable opinion there rendered [21] is interesting in its careful analysis of the actual purposes and results of the co-operative marketing of tobacco. Stating that the Sherman Act is today being liberally interpreted by the Supreme Court of the United States as prohibiting only "those transactions which were unlawful at common law," it was argued that the anti-trust statute of Ohio (the Valentine Act), which was drawn in "much broader and stronger terms than the Federal enactment," should also be liberally construed.

If the Valentine Act should be construed literally and strictly, no partnership could be formed, no corporation could be organized, no vendor could agree to a reasonable limitation upon his future business, no broker could represent more than a single merchant or manufacturer in the same industry, and a score of other things which have been permitted and approved for the past two or three centuries would now be under the ban. Anti-trust legislation can only be enacted under the police power of the state, in furtherance of the public welfare, and it has repeatedly been declared by the federal courts and the courts of the Union that it is beyond the power of

[21] List v. Burley Tobacco Growers' Co-operative Association, 114 O. S. 361, 151 N.E. 471 (1926). See also Dark Tobacco Growers' Co-operative Association v. Robertson, (Ind. App.) 150 N.E. 106 (1926).

any legislature to prohibit or penalize contracts which are not injurious. Any statute which deprives the citizen of the inalienable right to make such contracts is unconstitutional and void.

. . . Combinations formed to prevent disastrous competition have never been condemned unless unlawful means were employed. . . . The testimony does not show that any unfair methods were employed in the marketing of tobacco, or that the methods which were in fact employed were calculated to injuriously affect trade and commerce, or to increase the cost of the finished product to the consumer. There has been no effort to crush or oppress other producers of tobacco; nor does the evidence tend to show any agreement to limit or reduce production. It is true that the association carried on certain educational work, and freely advised its members as to marketing conditions and the supply and demand in the tobacco industry, and even advised the growers to grow less tobacco and employ their lands in raising alfalfa and other forage producing and soil-building crops. Such efforts on the part of the association differed in no wise from the efforts of the federal Department of Agriculture, but on the contrary coincide perfectly with the effects of the federal Secretary of Agriculture in all agricultural lines.

. . . The only fact in this case tending to indicate an effort on the part of the association to establish a fixed standard of prices is the storage of the tobacco beyond the year of its production, as was apparently done for the first year after the organization of the association. Clearly it is an unsound business policy, as well as an unsound economic policy, and, if it was the purpose of the association in storing the crop beyond the year of its production to force the manufacturers to pay an abnormal price for the same, that mistake has been demonstrated and the association has already been properly punished. There are too many independent producers to permit such a plan to be successfully carried out, and this fact has been demonstrated by the constantly increasing production

of Burley Tobacco from year to year since the organization of this association . . .

. . . It is apparent that the pool is not able to control prices . . . This controversy involves a legal problem, but the legal problem cannot be entirely divorced from the economic problem. It is not a question of control, but of reasonable regulation. There is no purpose to monopolize, but rather a purpose to stabilize, the production and marketing of Burley tobacco. We therefore agree with the trial court that there is no evidence of price fixing or other unlawful manipulation of normal conditions of supply and demand.

The latest case of a co-operative association involving the restraint of trade issue to be decided by a court of last resort adds South Carolina to the list of states on record as upholding such organizations and the statutes under which they were formed. In this case [22] the court was

of the opinion that the contract between plaintiff and defendant is not subject to attack under the anti-trust laws, state, federal, or at common law, for the reason that the contract does not attempt to unreasonably restrain trade or fix prices, but is intended to promote the legitimate interests of those engaged in agricultural pursuits. . . . The court can find no law nor reason to prevent the growers of cotton or any other commodity from organizing their marketing to the end that the product may be marketed in an orderly way and a reasonable profit obtained for the producers.

[22] South Carolina Cotton Growers' Co-operative Association v. English, 135 S. C. 19, 133 S.E. 542 (1926).

While the present volume was in process of publication, the Florida Supreme Court handed down a decision of similar import in Lee v. Clearwater Growers' Association, — Fla. —, 111 So. 722 (1927).

Finally, we should go back a period of a little more than a year prior to the South Carolina case to examine the situation in two states which call for somewhat particular attention in view of the fact that their courts of last resort had in the past declared the public policy of these states to be contrary to exclusive-dealing co-operative organizations. These cases involve Colorado and Iowa, and the decisions were handed down late in 1925. Both courts were careful to point out that the favorable decision in the case under consideration resulted from the enactment of new legislation. Said the Colorado court: [23]

> In Burns v. Wray Company and Atkinson v. Colorado Wheat Growers' Association we held such contracts were against public policy, but the act of 1923 changes the public policy of this state, and the contract in this case follows the act . . . It is objected that the contract is in restraint of trade and so void under the Colorado anti-trust law, but the act of 1923, being the later act, controls the earlier. It is claimed that the act of 1923 is unconstitutional . . . It hardly needs to be said that the act is not unconstitutional because it changes the rule of public policy. That would be to set public policy upon the throne of the Constitution.

The Iowa court [24] laid similar stress on the effect of the co-operative law of 1921 to supersede the earlier provisions of the Code with reference to monopoly and restraint of trade, saying:

[23] Rifle Potato Growers' Co-operative Association v. Smith, 78 Colo. 171, 240 P. 937 (1925).

[24] Clear Lake Co-operative Livestock Shippers' Association v. Weir, 200 Ia. 1293, 206 N.W. 297 (1925).

The thought of counsel is that section 11 promotes monopolistic agreements, price-fixing, the elimination of competition, and for these reasons is contrary to section 9915 [of the Code] as well as to public policy. The contention of counsel may be answered in two ways. In the first place chapter 122 was enacted subsequent to section 9915, supra . . . If the later act is repugnant to the prior statute and the two are wholly irreconcilable, then the prior must, in the petition involved, yield to the later statute. Chapter 122 is as much a declaration of public policy as section 9915 . . . Perhaps the Legislature, taking cognizance of altered conditions in farming and other industries, believed a change of public policy should be adopted. In the next place, a mere selling agency is not, per se, a monopoly. Reeves v. Decorah Farmers' Co-operative Society.

The court sought explicitly to reconcile this decision with previous rulings by observing that any apparent conflict with the Reeves and Ludowese cases was to be explained by the fact that they were both decided prior to the enactment of the new co-operative law "and involved almost wholly dissimilar facts. The conclusion reached in each of the above cases is based upon the statute or upon common law principles and not upon constitutional grounds." What might the phrase "almost wholly dissimilar facts" mean? First, both the shipping association at Decorah and the farmers' elevator at Hospers bought outright and sold for the account of the association rather than the individual shippers; second, they bought from non-members as well as members; and, third, they assessed a charge against members who sold outside the association.

In these earlier cases the court took exception to the collection by an association of what it described as a penalty, though apparently "a mere selling agency" (that is, one which shipped for members only on a service charge basis) might have been upheld in the assessing of a charge upon products shipped outside the association. At all events, the ruling on the co-operative statute of 1921 meets the needs of co-operatives following the modern pattern and recognizes that a new public policy has been definitely enunciated covering this type of co-operative organization.

Finally, even the mass of favorable decisions from the Atlantic to the Pacific and from Minnesota to the Gulf have not fully and forever disposed of the whole matter even where the most recent type of co-operative laws govern. The following chapter, after epitomizing briefly the legal position to which the co-operative form and method of operation have today attained, will examine the nature of the issues which still confront the movement.

CHAPTER XVI

CLASS LEGISLATION AND THE RULE OF REASON

We have been reviewing 75 years of evolution—commercial, legislative, and judicial—during which co-operation as practised by farmers has been acquiring its present legal status. It has been necessary to examine a mass of details so voluminous that the reader may well feel moved to ask for some generalization. He is perhaps inclined to demand bluntly, "Well, what *is* the legal status of co-operation?" In response to such a challenge three propositions may now be offered as a summary of what appears thus far to have been established by the statutes and cases. The resumé thus set forth in the first section of this chapter must, however, be qualified by two subsequent sections which point out that in two respects these are not final conclusions on a closed issue.

I. WHAT HAS THUS FAR BEEN ESTABLISHED

(1) It has been recognized that individual farmers have the right to organize for the better conduct of their common business enterprises and that such organizations are not *per se* illegal. This may be

called the right of collective action, and is set forth both in enabling acts and in general or special statutes, Federal as well as state, dealing with monopolies and restraints upon trade or competition and in a mass of judicial interpretation of these laws.[1]

The real test of public policy on this issue came with the attempt of zealous officials to apply the strict rule as a means of ameliorating the high cost of living during the years just following the close of the World War. Efforts were made in several places from Massachusetts to Californa to lower food prices by breaking up collective marketing groups. It was charged that they were inherently conspiracies in restraint of trade. We have noticed, however, that in only a single instance (see page 363) after the year 1918 has a court of last resort sustained such an interpretation even under existing co-operative laws and anti-trust statutes. On the other hand, there was a widespread movement beginning in 1918 but accelerating rapidly after the following year, which resulted in the adoption in nearly every state of the Union of new statutes or amendments to old ones designed to authorize much

[1] Whatever right of collective action existed under common law principles was, in the judgment of most courts, curtailed by early strict interpretations of the Sherman Anti-Trust Act and of the similar (and sometimes even more drastic) statutes of a considerable number of states. Emancipation of agricultural co-operatives from this new rule was occasionally effected by statute, as in the case of the amendment of 1909 to the anti-trust law of California and in the Clayton Act of 1914. While the latter was nation-wide in its jurisdiction, its application was by its terms restricted to non-stock and non-profit organizations.

stronger types of co-operative organization than had existed in the past, and to provide every legal safeguard for the continued existence and unhampered operation of such organizations.

(2) Certain distinctive practices (chiefly control of the member and his product and the distribution of authority and of financial burdens and benefits) which are part and parcel of the whole co-operative plan and method of carrying on business have secured the sanction of the law. Legislatures have expressed definitely in enabling acts and exemption statutes their intention that these forms or practices, indispensable to the permanence and successful operation of co-operatives, shall as such be legalized and not be considered as operating improperly to restrain trade. Both in the phrasing of the laws, (illuminated by parliamentary debate where it has been reported) and in the interpretations applied to these laws by the courts, it is obvious that the intention has been to accept the patent facts of technical restraint and to justify them upon grounds of public welfare and reasonableness.

(3) The membership corporation organically constructed on the basis of contractual relations for exclusive dealing [2] has thus become an accomplished fact under statute and case law as it stands over most parts of the United States at the opening of 1927.

[2] With remedies against the member and protection against outsiders prescribed in terms of civil damages, equitable relief

While the numerous citations presented in preceding chapters might convey the impression that the legal position of the co-operative according to this modern pattern has been definitely and completely determined, a closer scrutiny will reveal certain ambiguities in the situation. Though their effects probably will not be so serious as to rock the foundations upon which co-operation as a modern business institution is establishing itself, they do call for frank recognition and may in due time be found to require some modification in the phraseology of co-operative laws, the terms of contracts, the practices of organizations, and the teachings of the leaders.

The courts have upheld co-operative statutes, associations formed under them, contracts drawn by such associations, and numerous arrangements designed to effect the literal carrying out of these contracts. This they have done quite generally by invoking the "rule of reason." At the same time, however, and frequently by the same courts, the legislative support of such a commercial institution as has been created under the name of "co-operation" is justified on the basis of proper classification for purposes of legislation. Co-operatives are no doubt gratified to read the many amiable sentiments and reasoned vindications set forth in these judicial opinions. And yet one must be excused for a linger-

and even criminal penalties varying somewhat in the several states.

ing sense of doubt at the end in view of this double line of justification. We may put the issue in the form of three questions:

1. Do the courts hold that not merely forms of organization but also courses of action not permitted to other classes in the community are to be consciously recognized and authorized for those engaged in the pursuit of agriculture, even though such a course gives farmers special privileges? Or

2. Is it maintained that the institution of co-operation is inherently fitted to the circumstances of the agricultural industry in such a way that, even without the restraints proper to large-scale organization in any other field of industry, it can be safely left to go as far as or in whatever direction it may desire and yet not imperil the interests of other groups? Or

3. Is the judicial view merely that it is reasonable and proper under the circumstances of modern economic society to authorize and uphold the co-operative form of organization and certain practices which are indispensable incidents to its effective operation, but that the acts of such organizations shall, as to their actual effects upon members or others, be subject to exactly the same review by the courts as are the acts of organizations engaged in other industries or organized according to a different corporate pattern?

The determination of these questions involves little in the way of legal rule, but much in the

domain of economic and social considerations. We shall need, therefore, to review some of the positions set forth by courts and by co-operative spokesmen in the light of the economic philosophy (or philosophies) of co-operation touched upon in the earlier chapters of the book. We can simplify our examination of the rather confusing issues involved by disposing first of the question of classification and proceeding then to examine the rule of reason in its applicaton to co-operative organization and practice.

II. CO-OPERATIVE LAWS AS CLASS LEGISLATION

The charge that co-operative laws are improper class legislation has arisen only with the coming of the most recent type of co-operative statute. It was pointed out in Chapter II that the beginnings of co-operative organization in the United States concerned consumers' societies and co-laboring factory workers rather than farmers and, even after the movement took on a distinctly agricultural character, enabling acts were drawn in general rather than special terms. Thus the Massachusetts law of 1866 provided for associations organized "for the purpose of trade, or for carrying on any lawful mechanical, manufacturing, or agricultural business." Equally broad were the terms of subsequent statutes, including the California non-stock law of 1895 and the Wisconsin law of 1911, so widely copied in other states.

The California law of 1909, however, departed from this practice and applied only to "persons engaged in the production, preserving, drying, packing, shipping, or marketing of agricultural, viticultural, or horticultural products." There appears to have been no special reason for this narrowing of the scope of the law save that its proponents were themselves interested in agricultural production and marketing.[3] The Department bill of 1917 provided for "agricultural or horticultural associations instituted for the purpose of mutual help . . . by persons . . . engaged in agriculture or horticulture." The Solicitor naturally adopted the restricted rather than the general form because the bill was explicitly "designed to conform to section 6 of the Clayton Act." This raises the question of just what benefits or immunities were conferred in that act and how important it was therefore that co-operatives should bring themselves within its terms.

We have seen in Chapters X and XI that all that the Clayton Act did was to furnish a statutory declaration that the mere existence of such co-operative associations as conformed to its definitions should not be forbidden as illegal conspiracies *per se*. Rejecting proposals to amend the bill (1) to include the acts as well as the mere structure of co-operatives within its exemptions, and (2) to make its provisions applicable also to co-operatives following

[3] Similarly a Minnesota law of 1897 provided only for creameries and one passed in Michigan in 1899 related only to fruit marketing associations.

the Rochdale pattern, Congress simply declared to be legal a certain type of organization which along with other forms the courts, even in the absence of this declaration, were beginning to accept under interpretations of the Sherman Act, running as far back as 1910. We shall need to keep this "exemption" issue in mind as we proceed.

The next (and most influential) step toward making co-operative laws applicable only to agriculture was made in the so-called "standard marketing act" which came forward two years after the Department bill. It is not so clear why the restriction was employed in this case. Obviously it was not to take advantage of the provisions of the Clayton Act since it provided for associations with or without capital stock. Nevertheless, the chief protagonist of this measure has repeatedly made it plain that he attaches considerable importance to the supposed exemptions enjoyed by organizations under this act. He says:

> The only people in the United States who may and who have the power to organize without limitation are the farmers of the United States. No industry can do what you may do if you will by organization. Only the farmer can have a complete unlimited monopoly and still be in any measure within the law.[4]

The view that co-operative laws should be special legislation for agriculture appears to have been ac-

[4] Sapiro, Aaron, "Co-operative Marketing Legislation." *Proceedings* of the Fourth National Co-operative Marketing Conference, Washington, D. C., January, 1926.

cepted by Congress in passing the Capper-Volstead Act, and has been rather explicitly set forth by numerous state legislatures in the preamble to recent co-operative marketing acts (see page 102). The Supreme Court of the United States has not yet had occasion to pass upon the question, but it has been repeatedly upheld in state courts of last resort. A few citations will serve to reflect the general attitude of these state courts:

The Legislature has the power to enact laws which are applicable to all of a particular class of persons or things and not applicable to a different class of persons or things. Such legislation is general and not special. If this were not true a very large proportion of the statute law would be void.[5]

The [co-operative] law in question classifies an industry and makes this law apply with absolute equality to all of those who bring themselves within the conditions imposed by the law, and we are of the opinion that it in no way violates the Fourteenth Amendment and is not in conflict therewith. . . . In any event, the propriety of the classification for the purpose of legislation is primarily for the Legislature. . . . We will disturb the legislative determination only when the classification is arbitrary and without reasonable basis.[6]

The necessities of a great public interest may evolve legislation and authorize a reasonable classification as between diverse interests and organizations . . . Existing economic conditions may of themselves justify or compel legislation, classifying farmers as a class requiring beneficial legislations . . . The classification of farmers

[5] Oregon Growers' Co-operative Association v. Lentz, 107 Ore. 561, 212 P. 811 (1923).

[6] Minnesota Wheat Growers' Co-operative Marketing Association v. Huggins, 162 Minn. 471, 203 N.W. 420 (1925).

as a producing class whose labors are individualistic and not by the group, as in many other forms of labor, is a reasonable, just, and proper exercise of the power of classification . . . long recognized both in state and federal courts.[7]

It is because of basic economic conditions affecting vitally not only the farmers but also the public weal that the classification based upon agricultural pursuits is reasonable, just, and imperative for the good of the entire nation and every citizen thereof. If this be true, the Bingham Act is based upon a classification that is not offensive to the equal protection provisions of the Fourteenth Amendment . . . The Constitution in the Fourteenth Amendment declared the public policy of equal protection of laws unalterably both then and now . . . but being written for time rather than a day, most wisely left it to the Legislatures and the courts to provide the means and define the terms in accordance with an enlightened public consciousness, which continually strives toward . . . a better understanding of community life. Unquestionably, as that complex problem is understood by the best thought of today, the Bingham Act, enabling the farmers to market their crops co-operatively, . . . regulating distribution, and stabilizing prices, . . . serves a pressing public need that justified a classification of farmers as a distinct class and treats all of the class equally and fairly . . . It does not, therefore, offend the equal protection provisions of the federal Constitution, notwithstanding the fact that 21 years ago the Supreme Court of the United States in the case of Connelly v. Union Sewer Pipe Company indicated a somewhat contrary view, but which is, under the most recent decisions of that court, easily distinguished upon several grounds.[8]

[7] Harrell v. Cane Growers' Co-operative Association, 160 Ga. 30, 126 S.E. 531 (1925).

[8] Potter v. Dark Tobacco Growers' Co-operative Association, 201 Ky. 441, 257 S.W. 33 (1923).

See also Dark Tobacco Growers' Co-operative Association v.

Three states have met the issue of classification in a way to call for special attention. The Supreme Court [9] of Wisconsin found that it was not called upon to consider questions of classification, since the co-operative law of that state, although embracing many of the features characteristic of the Co-operative Marketing Act, had not been merely copied from the pattern statute, but had been a carefully considered redrafting of existing co-operative laws in the state and made to apply to "agriculture, dairy, mercantile, mining, manufacturing, or mechanical business." The court observed: "This provides a very wide field for the operation of these associations and relieves the law of any suspicion arising on its face at least of special or class legislation."

The Iowa statute of 1921, instead of being limited to "agricultural or horticultural associations," as provided in the Department bill upon which it was to a considerable extent patterned, retained and even expanded the phrase of the Iowa co-operative law of 1915, thus being a general law applicable to "any agricultural, livestock, horticultural, dairy, mercantile, mining, manufacturing, or mechanical

Dunn, 150 Tenn. 614, 266 S.W. 308 (1924); List v. Burley Tobacco Growers' Co-operative Association, 114 O. S. 361, 151 N.E. 471 (1926); Kansas Wheat Growers' Association v. Charlet, 118 Kan. 765, 236 P. 657 (1925); Liberty Warehouse Company v. Burley Tobacco Growers' Co-operative Association, 208 Ky. 643, 271 S.W. 695 (1925).

[9] Northern Wisconsin Co-operative Tobacco Pool v. Bekkedal, 182 Wis. 571, 197 N.W. 936 (1923).

business." [10] In spite of this inclusive statement, however, the Supreme Court of the state took occasion, when the statute first came before it for adjudication,[11] to rule that it was a perfectly proper piece of class legislation. In straightening up from the cramped posture which it had occupied since the Decorah decision, the court tried to stand so erect that it bent over backward. In justification of the classification which did not exist in the law it said:

> There is no industry to be found anywhere in which classifications based thereon are more natural, obvious, and exclusive than agriculture . . : Any five persons engaged in agriculture may organize a co-operative, nonprofit sharing corporation under the provisions thereof for the purpose of marketing the products of its members. . . . Many states have adopted similar enactments, and, so far as they have been passed upon by the courts thereof, they have been uniformly sustained . . .[12]

[10] The writer may add from personal knowledge that the fact that this statute was general rather than special in its terms went far toward disarming the hostility of members of the state legislature when the co-operative bill was presented for their action.

[11] Clear Lake Co-operative Livestock Shippers' Association v. Weir, 200 Ia. 1293, 206 N.W. 297 (1925).

[12] The situation with reference to the Oregon law was almost equally curious. We have noted above the defense of classification contained in the favorable decision in the Lentz case. This decision being cited as authority in a Colorado case (which we shall consider on the following page), the court replied: "That case is not in point because the Oregon act applied to all persons, not to agriculturists alone nor to any specified class." As a matter of fact, the Oregon law, though amended so as now to embrace the binding contract features of the Co-operative Marketing Act, is basically the Wisconsin-type law originally adopted by Oregon in 1915, and is made applicable to "any lawful business." Curiously enough, however, the same section of the

In Colorado, which had been the conspicuous example of a state which followed the Iowa court in the very strict interpretation of restraint of trade principles, the co-operative law of 1923 (essentially the "standard marketing act") being sweepingly upheld in 1925 [13] was declared not to be unconstitutional as class legislation. The court felt that the question was "a serious one because the privilege [of making co-operative marketing contracts] is conferred only upon persons 'engaged in the production of agricultural products' and is applied to 'agricultural products' alone." Conceding the authority of the legislature to classify where "some distinguished peculiarity makes reasonable the exception of the designated class," the court thought it "not clearly unreasonable to say that there are reasons for maintaining stability of the markets of agricultural products beyond like reasons in case of other products, and that we must therefore acquiesce in this classification."

However, a Federal District Court in Colorado a

statute which includes that phrase in its first sentence ends the same paragraph with the following statement:

"It is the public policy of the state of Oregon to encourage the production of agricultural products and to stabilize marketing conditions through the elimination of speculation and to bring about a lower cost of living through the establishment of more efficient systems of distribution. To this end it is and shall be lawful for persons who have associated themselves under this act to unite or consolidate any or all of their business activities by means of contracts or agreements between the members and their associations [etc.]."

[13] Rifle Potato Growers' Co-operative Association v. Smith, 78 Colo. 171, 240 P. 937 (1925).

month later declared the Colorado anti-trust law unconstitutional [14] as denying certain citizens rights granted to others under the co-operative law just upheld in the Rifle case. Quoting the restraint of trade sections of the Co-operative Marketing Act, the court said:

Nothing can be plainer than that these combinations authorized . . . in the Act would, in fact, be combinations in restraint of trade and an attempt to lessen competition in the marketing of agricultural products. A declaration that they should not be so considered is as futile as a statement that white is black. Of course, we do not pretent to say that the Legislature did not have the power to exempt such combinations from prosecution and dissolution as unlawful common-law or statutory trusts. . . . There can be no doubt that the later Act exempted the associations which it authorized from the penalties and restrictions of the earlier Act. The Supreme Court of the United States, in Connolly v. Union Sewer Pipe Company, . . . said:

". . . To declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill or acts to destroy competition and to control prices for their special benefit, is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

[14] Beatrice Creamery Company v. Klein, 9 Fed. (2d) 176 (1925). This case was appealed to the United States Supreme Court, which on May 31, 1927, declared the Colorado law unconstitutional, but on other grounds than those in the above case, no mention of the co-operative issue being made.

We reach a like conclusion as to the Colorado Anti-Trust Act.

This decision seems to put the District Court back in a position of strict construction practically identical with that occupied by the District Court in Texas 30 years earlier in the Grice case (see page 334). The reactionary character of the decision is all the more evident in view of a proviso of the Colorado anti-trust law that "no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purpose of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which *cannot otherwise* be so marketed." It would certainly take no wider latitude of interpretation than that repeatedly exercised by the Supreme Court of the United States in recent cases involving the Sherman Act had the District Court in Colorado held that both co-operative associations under the marketing act and ordinary corporations under general corporation laws were permitted to organize and exist each in accordance with its distinctive pattern, equally free in their respective field of activity so long as actually in practice neither resulted in monopolies harmful to the public or in unreasonable restraint of trade. Nothing contained in the decision in the Rifle case indicated that co-operatives would be permitted to go further than this.

However, a scrutiny of the various judicial opinions shows clearly that the framing of co-operative

statutes so as to apply to a single class does raise an issue which, although it has been successfully fought out before many state courts, has presented to opponents of the co-operative system a promising line of attack and one which conceivably may create serious difficulties for its supporters. Not merely must they face the possibility that the Supreme Court of the United States will look with disfavor on such a classification but, under changed circumstances, this feature might become a recurrent cause of litigation and perhaps of adverse decision in state courts.

The co-operatives have justified classification on two grounds: (1) the inherent nature of agriculture everywhere and always and (2) contemporary conditions in the industry. These reasons are set forth explicitly in many of the co-operative laws passed during recent years. The declaration of the Oregon law (note 10, page 412), in assigning as the purposes of the Act the encouragement of agriculture, stabilization of markets, and establishment of more efficient systems of distribution, sets up reasons which presumably will commend themselves at all times to both judicial and public opinion. But a large number of other states have adopted without alteration the words of the "standard marketing act," as follows:

> It is here recognized that agriculture is characterized by individual production in contrast to the group or factory system that characterizes other forms of indus-

trial production; and that the ordinary form of corporate organization permits industrial groups to combine for the purpose of group production and the ensuing group marketing and that the public has an interest in permitting farmers to bring their industry to the high degree of efficiency and merchandising skill evidenced in the manufacturing industries; and that the public interest urgently needs to prevent the migration from the farm to the city in order to keep up farm production and to preserve the agricultural supply of the nation; and that the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind, unscientific and speculative selling of crops. . . .

It has been argued that co-operatives organized under this law "are entitled to the exemption from the Sherman Anti-trust Act," though such immunity is not ascribed to the Clayton Act in effect when the "standard marketing act" was promulgated, but to another Federal law passed several years thereafter:

The Capper-Volstead Act says it all the way through. We are entitled to the exemption. Why? Because we as producer groups are different from all speculator groups. Our interest is in the land that keeps producing all the time. Speculative groups are interested only in the margins made by their money. Agriculture is characterized by individual production. All other forms of industry are characterized by group production and group organization. We have insisted that we are distinct and different . . . What is going to happen to that contention when suddenly we walk into a terminal association [under the Williams bill considered in the 2nd Session of the 68th Congress] made up of growers and

speculators? Where is your distinction? Why that very second all your rights under the exemption of the Sherman Anti-trust Act cease, and at that instant the co-operative marketing associations of the United States are amenable to that law and are headed straight for the rocks.[15]

From the standpoint of the economist the distinction drawn between the individualistic organization of agriculture and the group organization of all other industries is a very loose and inaccurate generalization. The economist's objection on this point is immaterial, however, since the principle of classification employed by the legislature will not be rejected by the courts unless palpably unreasonable. There is doubtless enough significance in the distinction between individualistic agriculture and group-organized industry so that courts may never feel it within their province to overrule a classification based thereon. When we turn to the second basis of distinction, however, the proponents of the marketing act occupy less favorable ground. The courts have repeatedly indicated that they were ready to follow the legislatures in holding that special treatment for agriculture was justified because of current conditions of depression in the industry. But what will happen if the depression passes? Will this view of the necessity for classification persist and cause courts permanently to

[15] Sapiro, Aaron, "State and Federal Legislation Relating to Co-operative Marketing, *Proceedings* of the Third National Co-operative Marketing Conference, Washington, D. C., January, 1925.

justify special legislation as a means of aiding agriculture?

The writer's answer on classification as a long-time issue will be set forth in the following chapter. The short-run fact is that courts are today accepting co-operative laws as proper class legislation. That being so, and the existence of co-operative associations in accordance with forms defined in the statutes being recognized, the really pressing question is how their operations are to be treated under the rule of reason applicable alike to all properly constituted commercial organizations.

III. APPLICATION OF THE RULE OF REASON

Numerous citations in previous chapters have already indicated clearly that in recent years courts have been practically unanimous in their willingness to uphold the co-operative form and structural arrangements as being only reasonable restraints upon trade or competition and, though somewhat monopolistic in their tendency, not to be interfered with until definite proof was presented establishing the fact that they had unreasonably enhanced prices, curtailed production, improperly harmed other business interests, or operated in a manner inimical to the public interest. Nor have they looked merely at questions of organization and found the co-operative structure reasonable. They have examined also many features in the actual operation of particular

associations and decided, time and again, under a variety of conditions, that these actual operations were not harmful to the public interest.

Contrary to the attitude of the Iowa court in the Decorah case, they have found that the resort to co-operation as an alternative market outlet tends not to stifle competition but to improve it,[16] to protect the producer against monopoly by the manufacturer or middleman[17] or, on the other hand, to prevent disastrous competition among unorganized sellers.[18] They have found co-operative associations not to be oppressive either to the consumer or to other classes in the community,[19] and the whole scheme of group marketing calculated to improve technical processes and financial methods and to stabilize both agricultural commerce and the whole economic situation in producing sections.[20] Even the tendency of the pooling method to verge toward manipulative market operations has been looked at without prejudice or undue alarm, the attitude being taken that the group has as much right as the individual to make such a time distribution of its product as will give it the best prospect

[16] Tobacco Growers' Co-operative Association v. Jones, 185 N. C. 265, 117 S.E. 174 (1923).

[17] List v. Burley Tobacco Growers' Co-operative Association, 114 O. S. 361, 151 N.E. 471 (1926).

[18] Minnesota Wheat Growers' Co-operative Marketing Association v. Huggins, 162 Minn. 471, 203 N.W. 420 (1925).

[19] Potter v. Dark Tobacco Growers' Co-operative Association, 201 Ky. 441, 257 S.W. 33 (1923).

[20] Brown v. Staple Cotton Co-operative Association, 132 Miss. 859, 96 So. 849 (1923).

of profitable returns,[21] though the Ohio court (List case) characterized it as "unsound business as well as economic policy" to store a crop beyond the year of its production. A Wisconsin court has even gone so far as to say that signing up 100 per cent of the crop would not of itself be ground for unfavorable action,[22] and several courts have quoted with approval the contention that undue restraint of trade through co-operative organization in agriculture is "physically, economically, and financially impossible." Whatever tendency toward manipulation of the market there might be would be self-corrective and thus hardly call for restrictive action by the courts. (See List case.)

Indeed, the student of these opinions may well ask whether the courts have not at times rather overshot the mark in their willingness to accept co-operation as a modern economic institution. Perhaps their estimate of the negligible danger of abuse of co-operative methods at the present moment, and possibly for all time, will, so far as the great staples are concerned, be borne out by the events of the future. But no great gift of imagination would be necessary to conceive conditions under which, for a time at least,[23] some exploitation of the consumer

[21] Kansas Wheat Growers' Association v. Charlet, 118 Kan. 765, 236 P. 657 (1925).

[22] Northern Wisconsin Co-operative Tobacco Pool v. Bekkedal, 182 Wis. 571, 197 N.W. 936 (1923).

[23] Running from a few weeks in the case of transportation difficulties to a season in the case of a short crop and even a period of several years in a line of agricultural production where several

might be distinctly possible under well-organized co-operatives. If so, we may reasonably expect to see a renewal of litigation and decisions less favorable than those characteristic of the last few years.

Already in many details of their business conduct some checking of the actual practices of co-operatives has been going on. In California the overzealous acts to which solicitors resorted in securing signatures to member contracts were discountenanced by the court.[24] In a Kansas case [25] overselling of the organization by misrepresenting its powers operated to release the member. Where a milk producer's contract called for the payment of $10 per cow upon the beginning of default and $3 per month additional as long as default continued, a New York dairyman found himself involved to the amount of $1,200 for a delinquent period during which his gross receipts had amounted to only $3,330. Although the contract set forth that no such "payments are to be construed to be a penalty

years would be required for expansion of operation to result in increased production.

[24] Sun Maid Raisin Growers v. Papazian, (Cal. Civ. App.) 240 P. 47 (1925). See also Commonwealth v. Riffitt, 149 Ky. 300, 148 S.W. 48 (1912).

[25] Kansas Wheat Growers' Association v. Vague, 118 Kan. 246, 234 P. 964 (1925).

However, mere statements of promoters as to advantages to be obtained through the association are viewed as simply expressions of opinion and, even though the anticipated benefits are not realized, do not constitute a fraud which would operate to release the contract signer. See South Carolina Cotton Growers' Co-operative Association v. English, 135 S. C. 19, 133 S.E. 542 (1926) and Burley Tobacco Growers' Co-operative Association v. Rogers, (Ind. App.) 150 N.E. 384 (1926).

or forfeiture but as stipulated liquidated damages," the court found that this claim of $1,200 was not reasonable in view either of the producer's receipts or of the pool expense, which amounted to only $75, and refused to enforce it.[26]

In attempting to apply to concrete cases a rule of reason socially expedient, the courts today do not have to rely merely upon their own wisdom. Considering intricate situations involved in such questions, they have, on issues involving fair trade practices in general, the assistance of the Federal Trade Commission and, upon questions involving the reasonableness of prices or marketing activities (where extremely difficult questions of statistical fact, accounting analysis, and economic theory are involved), the special aid of the United States Department of Agriculture under the authority conferred upon it in the Capper-Volstead Act. Of course the latter bodies have jurisdiction only over products moving in interstate commerce, but under present commercialized conditions of agriculture this category is rather inclusive.

The Federal Trade Commission was turned to by the Department of Justice to make a special study of the situation in the Associated Raisin Growers' case in California in 1920, and its recommendations were followed by the association in carrying out a reorganization satisfactory to the Department of Justice. While the Commission has authority to

[26] Dairymen's League v. Holmes, 202 N. Y. S. 663 (1924).

initiate legal proceedings itself as a result of investigations undertaken either on its own motion or in response to executive or legislative request (as in the case of the Shipstead resolution), it is in practice guided by the trend of judicial decision and not likely to attempt to confine the activities of co-operatives more closely than the line of reasonableness being marked out by the courts.

No controversy has as yet arisen under which to test the operation of the Capper-Volstead Act. Indeed, it may be said that at the moment the whole issue is quiescent, a very liberal attitude being taken today as a result of (1) a prevailing disposition to permit farmers to do whatever they may, by their own efforts, to alleviate the current depression in the industry, (2) a more intelligent as well as sympathetic understanding on the part of courts as well as the public of the real nature and effects of co-operation among farmers, and (3) the general tendency at the moment to look with more favor upon large-scale organization in all branches of business, on the theory that we cannot afford to cut ourselves off from the possible gains in efficiency and that public interests will be adequately protected by the courts. It by not means follows, however, that the present favorable sentiment will continue permanently.

CHAPTER XVII

CONCLUSION

The writer has sought thus far to present an objective account of the efforts of farmers to achieve commercial success and a satisfactory legal status for the co-operative type of organization. It has been his intention to keep his own personal opinions out of the story, although it has obviously been necessary to put an individual interpretation upon the purposes which co-operatives had in mind and upon the significance of the various measures which they developed as a means of attaining the desired results. This closing chapter is somewhat differently focused. In it the author turns from historical and analytical exposition to the rôle of appraisal. Under four general heads he will set forth his own conclusions as to the soundness and desirability of agricultural co-operative institutions in their present legal status.

1. It is well that co-operation, even of the forceful modern pattern, has been accepted as a going institution of present-day business. Co-operation is simply a special means of organizing an industry in large units for the purpose of securing the greatest pos-

sible efficiency of operation. We could not have transportation efficiency until a host of short link, branch lines, "jerk-water" railway companies, and terminal units were brought into great systems, and the process of merging is still going on. Industrial consolidation, banking concentration, chain stores, and great corporations of every sort are part and parcel of the established and accepted scheme of business progress and efficiency. But there are other lines of business which though still characterized by small individual units of production are nevertheless able to increase their efficiency if means are available to organize for the performance of certain common functions under some strong but flexible scheme of joint operation. Of such industries agriculture is the chief.

Evidence that co-operation promotes the efficiency of agriculture is to be found on every hand. It has been the means of establishing better methods of production, and has brought about an improvement of storage, reduction of waste, and economies in packaging costs, transportation, insurance, and credit. Efforts to improve and standardize quality of product and methods of handling make but slow progress when educational work must be carried to the individual farmer. They are greatly accelerated when co-operative organizations bring producers into fairly large groups.

What has been done thus far has hardly been more than the experimental and demonstrational

stage of such a development. As co-operatives grow and become more settled, they attract and train a better class of managerial ability and improve their technique. Both for the prosperity of agriculture and for the quality, dependability, and cheapness of the nation's supply of farm products, it is desirable that the door be left open to any workable and promising type of economic organization which aims at an increase of efficiency and which has demonstrated in any significant degree its ability to introduce improvements of this sort.

2. It is both inept and unnecessary for co-operative institutions to be developed as class legislation applicable only to agriculture. If one claims that farmers are entitled to special treatment because of their economic weakness as members of a naturally small-scale and unorganized industry, it must not be forgotten that there are other naturally small-scale industries (printing, plumbing, barber shops, grocery stores, and others) which from time to time feel that their efficiency can be advanced by joint activities essentially similar to those of agricultural co-operation. If co-operation is desirable as a means of facilitating attempts at more efficient economic organization, it should be made equally available to all persons the character of whose occupation causes them to desire it.

Earlier co-operative laws were so drawn as to include "any lawful business" or a considerable list of major occupational headings so phrased as to be

broadly inclusive. No disadvantages have resulted from making the co-operative form of organization available to other economic groups in Wisconsin, Iowa, Oregon, or other states where the co-operative law has been made general in its application. Neither are there distinctive and special advantages now accruing to the co-operatives which could not safely be granted to others were the same form made available to all. As the Minnesota Supreme Court well remarked: "It is certain that those who might wish to monopolize the market would never adopt this [co-operative] law for their instrumentality." Neither would barbers, druggists, or others, should they come under the provisions of such a law, be able to maintain prices in ways essentially different from those now in operation and enjoying judicial approval in the form of labor union "scales" and regulation of members, trade associations, or other agreements and understandings. Such practices now exist on sufferance until such time as they take on an unreasonable character and operate to oppress the public, and the same would apply if the trades in question were under a co-operative form of organization.

While much has been made in certain quarters of the supposed immunities conferred upon agricultural co-operatives by reason of their calling, the so-called "exemption" of co-operative associations is in reality an inclusion. Such measures simply define certain special organizations which might otherwise

be made the object of special attack and declare them to be proper and legal even in the face of anti-trust statutes which, in the absence of this specific definition, might be so construed as to discriminate against co-operatives even while great corporations of the ordinary form went unmolested.

The situation is even worse when, in drafting co-operative laws as class legislation for agriculture, the present distress of farmers is counted on to justify the conferring of special privileges. The "standard marketing act" recites that "the public interest urgently needs to prevent the migration from the farm to the city in order to keep up farm production and to preserve the agricultural supply of the nation." The considerable group of people now working so feverishly to effect some feasible means of solving the "surplus" problem might well even now look askance at special legislation "to keep up farm production and to preserve the agricultural supply of the nation." But even beyond this, it is conceivable, and some students tell us probable, that within the next decade or some longer period, more or less definitely forecast, agriculture will reverse its present position of relative depression to one of prosperity exceeding that of other classes. Then the cry of "high cost of living" will again ring through the land and the public prosecutor and the private attorney might turn upon the organized producers and sellers of farm products in a vigorous, even savage, attack upon the laws which enable them

to organize to take the fullest possible advantage of their then strong economic position. In such an hour the class character of this legislation would be a danger rather than a help.

Some of the favorable decisions already handed down indicate that courts have been so swayed by emotions of sympathy with the farmer in his present situation that the flavor of the political tract at times threatens to suffuse the stricter forms of judicial reasoning. It seems probable, therefore, that the argument for classification on the basis of current economic conditions might under other circumstances be turned against the co-operatives by courts equally sensitive to the social effects of legislation. If so, the co-operative form would be in a stronger position if, instead of being provided for a single class and resting somewhat precariously upon their need of special help in a period of distress, all laws of the special type were amended to include other citizens in whatever calling whose circumstances might cause them to feel that their interests would be forwarded by co-operative organization without at the same time infringing the rights of others or impairing the welfare of the public. It is not in the arbitrary restriction of the field of co-operative activity, but in the existence of general safeguards, that the public safety rests. (See page 335.)

3. Even large and powerful co-operative organization does not constitute a public menace, owing to the presence of natural and institutional checks

upon the abuse of power. In the first place, it has already been pointed out that persons who are inclined to avail themselves of the co-operative form are those who follow a naturally small-scale and decentralized type of industry. The sort of business which lends itself to monopoly already has available in the ordinary business corporation an agency as strong or stronger and more easily controlled than co-operation can by its very nature ever be. On the other hand, small-scale industries are naturally competitive, since it is an easy matter for anyone attracted by the profits of the industry to embark upon it and for this stream of new operating units rapidly to weaken any monopolistic position which might be built up.

The impossibility of shutting off the inflow of such competitive elements is probably as marked in agriculture as in any other industry, and decidedly more so than in the great majority of callings. Furthermore, the possibilities of substitution of one fruit or vegetable, of one food or textile product, for another are so great in a rich and diversified country like the United States as still further to narrow the monopolizing power of any group of farm producers.

And, finally, the courts and other regulatory bodies stand ready to protect the public from unreasonable exactions by any group of producers and sellers organized co-operatively or otherwise. Many of the judicial opinions which we have cited show

clearly that the courts, in their liberal recognition of general forms and practices, accept also their own responsibility of so guiding the course of co-operative activity as to permit the working out of any benefits it is capable of conferring without at the same time allowing it to become genuinely harmful or improperly discriminatory as between individuals and groups.

As with all forms of aggressive economic activity, co-operative endeavor may be counted upon to present from time to time innumerable specific cases in which the right of the association to pursue a certain line of conduct will be challenged by those who conceive themselves to be harmed thereby. In such contingencies the doors of the court will be found continually open for the presentation of any new case on its merits, even though in such litigation it might be agreed that the form and general practices of co-operatives had been fully accepted. We may indeed expect the record of future years to show a fairly large number of cases in which the actual market operation of particular associations will be in one regard or another curbed by the courts. This eventuality is clearly recognized in several of the opinions previously cited in connection with a favorable decision in the case under consideration. One such statement will suffice. Said the Minnesota Supreme Court: "We do not say that this organization like any other corporation, association or individual may not violate the law. It may. If so,

it may be punished the same as all other persons or corporations who transgress."

As already indicated, the wisdom of the courts in these matters is supplemented in some degree by the special facilities of the Federal Trade Commission and of the United States Department of Agriculture under the Capper-Volstead Act. Whatever shortcomings these agencies may from time to time reveal in their treatment of co-operative problems will simply be the result of errors of human judgment on matters where no supreme and absolute standard of right or wisdom is available and where the merits of the issue will be judged differently by different segments of public opinion. It is not to be presumed that unfortunate results in this field of human effort and experiment will be any greater or any less than those appearing under non-co-operative forms of business organization. Their remedy is to be found in improvement of our regulatory agencies, either through better personnel or more adequate understanding of the economic problems involved, not through the abolition or restriction of the co-operative form of business organization.

4. No formula for the regulation of co-operative activities can be laid down in definite and final terms. It presents a perennial issue of social control, and the answer as to what is reasonable, fair, and proper in given times and places and under specific circumstances must be left open for fresh determination as the occasions arise.

The basic economic question presented by co-operative organizations is one of control. What kind and degree of control internally (that is, over members' action or property) is it expedient to permit or facilitate? What latitude and what limits shall be put upon control which it exercises externally, that is, as it affects prices and the public? In the first of these questions, the general public is only mildly concerned. The distinctive theories of co-operatives with reference to the "equitable" distribution of wealth in the form of dividends on capital or patronage dividends on products or the allocation of voting control within a business group stir but languid interest, if any, among persons not themselves identified with co-operative undertakings.

While occasionally someone expresses alarm over the power of co-operative organizations to coerce their members and impose "involuntary servitude" upon them, it is generally looked upon as their own concern, and the sturdy yeoman, "white, free, and twenty-one," is thought to be able to take care of himself with only the ordinary recourse to legal remedies. If, as one court remarked, the farmer wishes to put "his head within the halter" of a membership agreement enforcing strict discipline and curtailment of his subsequent freedom of commercial action, that may well be left to his own discretion, as it is in the case of the labor unionist and others.

But if a concentration of control has been facili-

tated which may be exploited to the point of oppression of every eater of food or wearer of textiles, this is a matter of public concern. We come back, therefore, to the dilemma mentioned in Chapter XIII (page 330). On the one hand, co-operatives demand a degree of control which shall give them not merely units large enough for marketing economy and efficiency, but also a bargaining position and strength which shall have significance directly in the determination of basic prices. Courts, as we have seen, have been quite willing to uphold the co-operatives in the exercise of powers necessary to assume an efficient and sometimes even a dominant position in the market, being convinced apparently that this makes for economy, business stabilization, and a desirable diffusion of prosperity.

At the same time, however, they have not allowed their approval of these activities and effects of the co-operative system to impale them on the other horn of the dilemma, namely, the endorsement of agricultural monopolies capable of and actually engaged in exploitation of the consuming public. In fact, it is not too much to say that the courts by and large have been better exponents of sound economics in this important formative period than have been the more exuberant leaders in the recent "commodity marketing" movement.

The latter have presented co-operation as a solution of the farmer's ills and have urged that, granted power to dominate the supply side of a given market,

co-operation could secure cost of production (including profits at rates prevailing in other successful lines of business) without the necessity of curtailing the scale of productive operations. Baldly stated, this is a theory that prices in a controlled market can be maintained at a set level by mere time and place equalization without concern as to the long-time average volume of output. If one presses the analysis of such a theory relentlessly to its foundation, he must find that it rests on the assumption that there always exists in the market an adequate demand at profitable prices—a palpable absurdity. Likewise, this simple theory makes little or no distinction between commodity markets having the most divergent trade organization and price-making mechanisms, assuming that essentially the same forms and methods which are effective, or even indispensable, in the case of tobacco or milk will be equally desirable and operate to the same end in the case of cotton, grain, livestock, or potatoes. The courts of a given section, on the other hand, are likely to be sufficintly well-informed as to basic commercial situations or to acquire such information through the testimony and arguments introduced during the progress of a case to its final determination as not to fall into serious error in judging the essential merits of the several situations.

For instance, a Minnesota court (see page 386) with a pretty firm grasp on the realities of wheat marketing under its present system of grain

exchange organization, future trading, and international commerce observes that the state wheat pool "can do little more than a businesslike farmer who is financially able to choose his market. By reason of having credit it may do more than the farmer whose finances will not permit him to wait for a satisfactory market. It may perhaps, by selling in larger quantities, sell to better advantage, but no better than any other dealer or sellers' agency with ample capital." Under these circumstances the court felt it distinctly right and proper to maintain the integrity of the pool organization as a means of bringing the weaker, less intelligent, or more impecunious members of the group up to the level of the best individual.

A Georgia court (see page 384) in upholding the devices of the syrup producers' organization designed to accomplish effective group action, looks broadly and intelligently at the competitive position of syrup produced by Georgia growers, possibilities of increase of production, practice of sale in a competitive market, and the like. It thereupon rules that even if complete solidarity of action were achieved by this group it would not put them in possession of monopoly powers inimical to the public interest.

Both Ohio and Indiana courts (see pages 393 and 356) have taken cognizance of the existing trade organization in the tobacco market which makes it impossible for the individual to bargain on an equal footing and, on the other hand, has not, under

the present development of tobacco co-operatives, resulted in giving producers a power disproportionate to that long exercised on the buying side.

While the public is extremely sensitive to even moderate enhancement of the cost of its essential subsistence goods, and inclined to look with quick and intense suspicion upon anything which savors of price-fixing or an "artificial" price-making agency by which co-operatives have superseded the "natural" method of equating supply with demand through the higgling of an open or unorganized market, courts have shown commendable appreciation of the necessity of new market and price institutions to meet the changing conditions of our economic life, and willingness to examine these new arrangements strictly on their merits. In such circumstances the burden of proof is of course upon the innovator, and it will continue to be necessary, perhaps increasingly so, for producers' organizations to show that the character and degree of direction which they are exercising over the production and distribution of farm products are definitely justified in a given case, the social desirability of such promotion of members' interests being equal to or greater than any burden imposed thereby on other members of the community.

What the courts have thus far done has hardly more than established a general position and dealt with the simpler situations. As time goes on, and particularly if agricultural prices acquire an upward

trend, many and difficult specific issues must be faced. It would be futile to attempt to prophesy just what form they will take, but a few situations which might reasonably be expected to draw attack and call for judicial review may be suggested. (1) May co-operatives maintain one price level in this country and a distinctly lower one for part of the products sold abroad, and thus maintain in the domestic market a comparatively high price and for their members a comparatively high level of return? If so, what will be the standard to be applied either to a reasonable domestic price, reasonable returns to the member, or a reasonable export quantity or price differential? (2) Shall co-operatives be free to decide for themselves the scale of prices which shall obtain as between different markets, different periods in the marketing season, and different closely related products or by-products which fall within a single control? If not, shall we establish some general rule analogous to the "long and short haul" clause with reference to our rate structure and set up a commission to hear complaints and attempt to bring a socially desirable adjustment? (3) Shall co-operatives be permitted to use the full strength of their organization to adjust productive operations to the absorptive power of the market in such a ratio as to produce any level of prices which they conceive to be desirable?

While no attempt will be made to answer, or even to suggest the character of the answer which might

be made to these questions, they are set down merely as showing that after all is said that may be said in our statutes, or done that may be done in the way of regulatory agencies, the final question as to permissible action at a given time and place is an essentially judicial function, and that it must be exercised by our courts as a part of the general machinery of social control. The law has not given to farmers a right of organization denied to others, nor exempted them from restrictions imposed on other classes. It has simply perceived that in the process of perfecting more complex and more efficient machinery for the carrying on of modern business the standard pattern of corporate organization needed to be considerably modified that it might serve more adequately the needs of the agricultural industry. These adaptations having been made in response to the demands of the agricultural industry, it may be said that the farmer is no longer discriminated against, as in the past, nor given special favors, as some of his more ardent friends would have desired.

It is idle to tell the farmers (see pp. 406 and 415) that they are possessed of special rights of "unlimited monopoly" with special "distinction" and "exemptions" or that they are "the only people in the United States who have the power to organize without limitation." What we should say is this: "Whereas previous business forms were ill-suited to your needs and gave you practically no power of

effective organization, present co-operative statutes (as already adjudicated) give you an institution admirably suited to the peculiar needs of your business and put within your grasp facilities for effective organization fully equal to but no greater than those enjoyed by other classes or industries."

Obviously, different commodities with different productive and trade organizations at different times and in different places will present problems of the greatest difficulty to even the best-intentioned official. There is a demand for careful scientific analysis of these several organizations and their problems. The present volume has attempted nothing beyond showing the evolving nature of co-operation as a modern economic institution. How this institution is actually being applied in particular branches of our agricultural industry—cotton, grain, tobacco, livestock, milk, or other—constitutes another, a larger, and an indefinitely continuing field of study.

APPENDICES

APPENDIX A

WISCONSIN CO-OPERATIVE LAW OF 1911

CHAPTER 368.

Co-operative associations; who may organize; purposes. SECTION 1786e—1. Any number of persons, not less than five, may associate themselves as a coöperative association, society, company, or exchange, for the purpose of conducting any agricultural, dairy, mercantile, mining, manufacturing or mechanical business on the coöperative plan. For the purposes of this act, the words "association", "company", "corporation", "exchange", "society" or "union", shall be construed to mean the same.

Articles: contents. SECTION 1786e—2. They shall sign and acknowledge written articles which shall contain the name of said association and the names and residences of the persons forming the same. Such articles shall also contain a statement of the purposes of the association and shall designate the city, town or village where its principal place of business shall be located. Said articles shall also state the amount of capital stock, the number of shares and the par value of each.

Articles: verification; filing; charter. SECTION 1786e—3. The original articles of incorporation organized under this act or a true copy thereof, verified as such by the affidavits of two of the signers thereof, shall be filed

with the secretary of state. A like verified copy of such articles and certificates of the secretary of state, showing the date when such articles were filed with and accepted by the secretary of state, within thirty days of such filing and acceptance, shall be filed with and recorded by the register of deeds of the county in which the principal place of business of the corporation is to be located, and no corporation shall, until such articles be left for record, have legal existence. The register of deeds shall forthwith transmit to the secretary of state a certificate stating the time when such copy was recorded. Upon receipt of such certificate the secretary of state shall issue a certificate of incorporation.

Filing fee. SECTION 1786e—4. For filing of articles of incorporation of corporations, organized under this act, there shall be paid the secretary of state ten dollars and for the filing of an amendment to such articles, five dollars. For recording a copy of such articles the register of deeds shall receive a fee of twenty-five cents to be paid by the person presenting such papers for record.

Directors: election; duties; election of officers. SECTION 1786e—5. Every such association shall be managed by a board of not less than five directors. The directors shall be elected by and from the stockholders of the association at such time and for such term of office as the by-laws may prescribe, and shall hold office for time for which elected and until their successors are elected and shall enter upon the discharge of their duties; but a majority of the stockholders shall have the power at any regular or special stockholders' meeting, legally called, to remove any director or officer for cause, and fill the vacancy, and thereupon the director, or officer so removed shall cease to be a director or officer of said asso-

ciation. The officers of every such association shall be a president, one or more vice-presidents, a secretary and a treasurer, who shall be elected annually by the directors, and each of said officers must be a director of the association. The office of secretary and treasurer may be combined, and when so combined the person filling the office shall be secretary-treasurer.

Amendments: how adopted; recording. SECTION 1786e—6. The association may amend its articles of incorporation by a majority vote of its stockholders at any regular stockholders' meeting, or at any special stockholders' meeting called for that purpose, or ten days' notice to the stockholders. Said power to amend shall include the power to increase or diminish the amount of capital stock and the number of shares. Provided, the amount of capital stock shall not be diminished below the amount of paid-up capital at time amendment is adopted. Within thirty days after the adoption of an amendment to its articles of incorporation, an association shall cause a copy of such amendment adopted to be recorded in the office of the secretary of state and of the register of deeds of the county where the principal place of business is located.

Business authorized to be conducted. SECTION 1786e—7. An association created under this act shall have power to conduct any agricultural, dairy, mercantile, mining, manufacturing, or mechanical business, on the coöperative plan and may buy, sell and deal in the products of any other coöperative company heretofore organized or hereafter organized under the provisions of this act.

Stock; issue; limit; vote. SECTION 1786e—8. No stockholder in any such association shall own shares of

a greater aggregate par value than one thousand dollars, except as hereinafter provided, or be entitled to more than one vote.

Subscription of stock in other associations. SECTION 1786e—9. At any regular meeting, or any regularly called special meeting at which at least a majority of all its stockholders shall be present, or represented, an association organized under this act may, by a majority vote of the stockholders present or represented subscribe for shares and invest its reserve fund, or not to exceed twenty-five per cent of its capital, in the capital stock of any other coöperative association.

Purchasing business of other associations: payment, stock issue. SECTION 1786e—10. Whenever an association, created under this act, shall purchase the business of another association, person or persons, it may pay for the same in whole or in part by issuing to the selling association or person shares of its capital stock to an amount, which at par value would equal the fair market value of the business so purchased, and in such case the transfer to the association of such business at such valuation shall be equivalent to payment in cash for the shares of stock so issued.

Certificates of stock; when held in trust; issue. SECTION 1786e—11. In case the cash value of such purchased business exceeds one thousand dollars the directors of the association are authorized to hold the shares in excess of one thousand dollars in trust for the vendor and dispose of the same to such persons, and within such times as may be mutually satisfactory to the parties in interest, and to pay the proceeds thereof as currently received to the former owner of said business. Certificates of stock shall not be issued to any subscriber until

fully paid, but the by-laws of the association may allow subscribers to vote as stockholders; provided, part of the stock subscribed for has been paid in cash.

Stockholders may vote by mail. SECTION 1786e—12. At any regularly called general or special meeting of the stockholders a written vote received by mail from any absent stockholder and signed by him may be read in such meeting and shall be equivalent to a vote of each of the stockholders so signing; provided, he has been previously notified in writing of the exact motion or resolution upon which such vote is taken and a copy of same is forwarded with and attached to the vote so mailed by him.

Earnings; apportionment. SECTION 1786e—13. The directors, subject to revisions by the association at any general or special meeting, shall apportion the earnings by first paying dividends on the paid-up capital stock not exceeding six per cent per annum, then setting aside not less than ten per cent of the net profits for a reserve fund until an amount has accumulated in said reserve fund equal to thirty per cent of the paid-up capital stock, and five per cent thereof for an educational fund to be used in teaching coöperation, and the remainder of said net profits by uniform dividend upon the amount of purchases of shareholders and upon the wages and salaries of employes, and one-half of such uniform dividend to non-shareholders on the amount of their purchases, which may be credited to the account of such non-shareholders on account of capital stock of the association; but in productive associations such as creameries, canneries, elevators, factories, and the like, dividends shall be on raw material delivered instead of on goods purchased. In case the association is both a selling and a productive

concern, the dividends may be on both raw material delivered and on goods purchased by patrons.

Distribution of dividends. SECTION 1786e—14. The profits of net earnings of such association shall be distributed to those entitled thereto, at such times as the by-laws shall prescribe, which shall be as often as once in twelve months. If such association, for five consecutive years shall fail to declare a dividend upon the shares of its paid-up capital, five or more stockholders, by petition, setting forth such fact, may apply to the circuit court of the county, wherein is situated its principal place of business in this state, for its dissolution. If, upon hearing, the allegations of the petition are found to be true, the court may adjudge a dissolution of the association.

Annual report; contents; filing. SECTION 1786e—15. Every association organized under the terms of this act shall annually, on or before the first day of March of each year, make a report to the secretary of state; such report shall contain the name of the company, its principal place of business in this state, and generally a statement as to its business, showing total amount of business transacted, amount of capital stock subscribed for and paid in, number of stockholders, total expenses of operation, amount of indebtedness or liabilities, and its profits and losses.

Co-operative associations heretofore organized; may adopt provisions of this act. SECTION 1786e—16. All coöperative corporations, companies, or associations heretofore organized and doing business under prior statutes, or which have attempted to so organize and do business, shall have the benefit of all the provisions of this act, and be bound thereby on filing with the secretary of state a

written declaration signed and sworn to by the president and secretary to the effect that said coöperative company or association has by a majority vote of its stockholders decided to accept the benefits of and to be bound by the provisions of this act. No association organized under this act shall be required to do or perform anything not specifically required herein, in order to become a corporation or to continue its business as such.

Use of term "co-operative" limited to corporations under this act. SECTION 1786e—17. No corporation or association hereafter organized or doing business for profit in this state shall be entitled to use the term "coöperative" as part of its corporate or other business name or title, unless it has complied with the provisions of this act; and any corporation or association violating the provisions of this section may be enjoined from doing business under such name at the instance of any stockholder of any association legally organized hereunder.

Section 2. This act shall take effect and be in force from and after its passage and publication.

APPENDIX B

CALIFORNIA NON-STOCK LAW OF 1909

Chapter 26.

Formation and purposes of. Section 653m.—Three or more persons engaged in the production, preserving, drying, packing, shipping, or marketing of agricultural, viticultural or horticultural products, or all of them, may form a non-profit coöperative association under the provisions of this title, to carry on said business, and such association shall have, and may exercise, the powers authorized by this title, and the powers necessarily incidental thereto, and all other powers granted to private corporations by the laws of this state, except such powers as are inconsistent with those granted by this title.

Membership. Section 653n.—Such association shall not have a capital stock, and its business shall not be carried on for profit. Any person or any number of persons, in addition to the original incorporators, may become members of such association, upon such terms and conditions as to membership, and subject to such rules and regulations as to their, and each of their, contract and other rights and liabilities between it and the member as the said association shall provide in its by-laws. The association shall issue a certificate of membership to each member, but the said membership, or the said certificate thereof, shall not be assigned by a member to any other person, nor shall the assigns thereof be entitled to

membership in the association, or to any property rights or interest therein. Nor shall a purchaser at execution sale, or any other person who may succeed, by operation of law or otherwise to the property interests of a member, be entitled to membership, or become a member of the association by virtue of such transfer. The board of directors may, however, by motion duly adopted by it, consent to such assignment or transfer and to the acceptance of the assignee or transferee as a member of the association, but the association shall have the right, by its by-laws, to provide for or against the transfer to membership and for or against the assignment of membership certificates, and also the terms and conditions upon which any such transfer or assignment shall be allowed.

Articles of incorporation. SECTION 653o.—Each association formed under this title must prepare and file articles of incorporation setting forth:

1. The name of the association.

2. The purpose for which it is formed.

3. The place where its principal business will be transacted.

4. The term for which it is to exist, nor exceeding fifty years.

5. The number of directors thereof, which must not be less than three and which may be any number in excess thereof, and the names and residences of those selected for the first year and until their successors shall have been elected, and shall have accepted office.

6. Whether the voting power and the property rights and interest of each member shall be equal or unequal, and if unequal the articles shall set forth a general rule or rules applicable to all members by which the voting power and the property rights and interests, respectively,

of each member may and shall be determined and fixed, but the association shall have power to admit new members who shall be entitled to vote and to share in the property of the association with the old members, in accordance with such general rule. This provision of the articles of incorporation shall not be altered, amended, or repealed except by the unanimous written consent or the vote of all of the members.

7. Said articles must be subscribed by the original members and acknowledged by one of them before an officer authorized by the law of this state, to take and certify acknowledgments of deeds of conveyance, and shall be filed in accordance with the provisions of section 296 of this code, and when so filed the said articles of incorporation or certified copies thereof shall be received in all the courts of this state, and other places, as prima facie evidence of the facts contained therein.

By-laws. SECTION 653p.—Each association incorporated under this title must, within thirty days after its incorporation, adopt a code of by-laws for its government and management not inconsistent with the provisions of this title. A majority vote of the members or the written assent of members representing a majority of the votes is necessary to adopt such by-laws. The provisions of sections 303 and 304 of this code, which are not inconsistent with the provisions of this title, shall apply to the by-laws of the corporations provided for in this title. Each association may also, by its by-laws adopted as aforesaid, provide for the following matters:

1. The manner of removal of any one or more of its directors and for filling any and all vacancies in the board of directors.

2. The number of directors and the number of members of votes thereof constituting a quorum.

3. The conditions upon which and the time when membership of any member in the association shall cease; the mode, manner and effect of expulsion of a member, subject to the right of the expelled member to have the board of directors equitably appraise his property interests in the association and to fix the amount thereof in money, and to have the money paid to him within sixty days after such expulsion.

4. The amount of membership fee, if any, and the amount which each member shall be required to pay annually, or from time to time, if at all, to carry on the business of the association, and also the compensation, if any, to be paid by each member for any services rendered by the association to him, and the time of payment and the manner of collecting the same, and for forfeiture of the interest of the member in the association for non-payment of the same.

5. The number and qualifications of members of the association and the conditions precedent to membership and the method, time and manner of permitting members to withdraw, and providing for the assignment and transfer of the interest of members, and the manner of determining the value of such interest and providing for the purchase of such interest by the association upon the death, withdrawal or expulsion of a member or upon the forfeiture of his membership, at the option of the association.

6. Permitting members to vote by their proxies, and determining the conditions, manner, form and effect thereof.

Powers of association. SECTION 653q.—Each association incorporated under this title shall have the powers granted by the provisions of this code and other laws of California relating to private corporations, and shall also have the following powers:

1. To appoint such agents and officers as its business may require, and such appointed agents may be either persons or corporations; to admit persons to membership in the association, and to expel any member pursuant to the provisions of its by-laws; to forfeit the membership of any member for violation of any agreement between him and the association, or for his violation of its by-laws.

2. To purchase or otherwise acquire, hold, own, sell and otherwise dispose of any and every kind or kinds of real and personal property necessary to carry on its business, and to acquire by purchase or otherwise the interest of any member in the property of the association.

3. Upon the written assent or by a vote of members representing two-thirds of the total votes of all members to coöperate with any other coöperative corporation or corporations for the coöperative and more economical carrying on of their respective businesses, by consolidation as provided in section 653i of this code, whereupon the effect of such consolidation shall be the same as declared in said section; or upon resolution, adopted by its board of directors, to enter into all necessary and proper contracts and agreements, and to make all necessary and proper stipulations and arrangements with any other coöperative corporation or corporations for the cooperative and more economical carrying on of its business, or any part or parts thereof; or any two or more coöperative corporations organized under this title, upon

resolutions, adopted by their respective board of directors, may, for the purpose of more economically carrying on their respective businesses, by agreement between them, unite in employing and using, or several associations may separately employ and use, the same methods, means and agencies, for carrying on and conducting their respective businesses.

4. Any association formed or consolidated under this title may be dissolved and its affairs wound up voluntarily by the written request of members representing two-thirds of the total votes, in the manner and with the effect provided in section 653j of this code, except that the moneys remaining after liquidation shall be divided among the members in proportion to their property interests therein.

Amendment of articles of incorporation. SECTION 653r.—Any corporation, whether stock or membership, heretofore incorporated under the laws of this state for the purpose of engaging in and carrying on the business specified in section 653m of this title, the stockholders or members of which would be entitled to incorporate under the provisions of this title, may, by the unanimous written assent or vote of all the stockholders or members, amend its articles of incorporation to conform to the provisions of this title in the manner and with the effect provided in section 362 of the Civil Code, and from the time of filing the amended articles, such corporation shall have the same powers as if it had originally incorporated under the provisions of this title; *provided, however,* that the debts, obligations, and other liabilities against such corporation or against the members or the stockholders thereof, existing at the time of such amendment, shall not be discharged or their collection or enforcement

otherwise impaired; *and provided further,* that the respective property interests of the several stockholders by virtue of their ownership of shares of stock therein, or the several members by virtue of their membership therein, and also the voting power of each of them, shall be determined and fixed by the amended articles of incorporation in accordance with the provisions of subdivision 6 of section 653o, but which rights shall be subject to the right of the association to admit new members.

Quo warranto. SECTION 653s. —The right of an association claiming to be organized and incorporated and carrying on its business under this title, to do and to continue its business, may be inquired into by quo warranto at the suit of the attorney general, but not otherwise.

APPENDIX C

THE DEPARTMENT OF AGRICULTURE CO-OPERATIVE BILL

SECTION 1. In this act, unless the context otherwise require, "association" means an association formed under this act; "member" means a member of an association; "person" includes a corporation or partnership or two or more persons having joint or common interest; words used import the singular or the plural, as the case may demand.

SECTION 2. Coöperative agricultural or horticultural associations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, may be formed, under the provisions of this act, by any number of persons, not less than five, engaged in agriculture or horticulture.

SECTION 3. An association may, as agent for its members or any of them, perform for them services connected with the production, preservation, drying, canning, storing, handling, utilization, marketing, or sale of agricultural and horticultural products produced by them, and for the agricultural or horticultural purposes of such members, may perform for them services connected with the purchase or hiring for, or use by, them, of supplies, including live stock, machinery and equipment, and the hiring of labor, or any one or more of the kinds of service specified in this section.

SECTION 4. The persons uniting to form an association

shall enter into articles of association in writing, which shall state—

(*a*) The name of the association, which shall include the word "coöperative," which name shall not be the same as that of any other association or corporation formed or doing business in this State or so similar to such name as to be likely to be confused therewith;

(*b*) The class of services to be performed for its members by the association, which services shall be among those mentioned in section three of this act;

(*c*) The place where its principal operations are to be carried on, which shall be a place within this State;

(*d*) The term for which such association is to exist;

(*e*) The date of the commencement of its fiscal or business year;

(*f*) The names and post-office addresses of the directors, not less than five, designated to serve until their successors are elected;

(*g*) Any other provisions, not inconsistent with law, which the association may see fit to adopt, governing the regulation and the conduct of its affairs.

The articles of association shall bear the signatures and post-office addresses of the persons uniting to form the association, and shall be acknowledged by not less than five of such persons, before an officer duly authorized to administer oaths in this State, which acknowledgment shall be authenticated by the seal of such officer. The articles of association, so acknowledged and authenticated, together with a true copy thereof, shall be transmitted to [the proper State officer], who shall, if in his opinion the provisions of law applicable thereto have been complied with, file and record the same. He shall issue his certificate showing such filing, which, together

with said copy of the articles of association, he shall transmit to the office [the proper county officer] in the county in which the place described in subdivision (*c*) of this section is located in which office said copy and certificate shall be filed and recorded. Such county officer shall thereupon issue his certificate showing the fact and date of filing of said true copy of the articles of association in his office and transmit the same to the association.

SECTION 5. The articles of association may, pursuant to an affirmative vote of two-thirds of all of the members, be amended at any regular meeting, or at any special meeting called for the purpose, due notice of the time, place, and object of which regular or special meeting shall have been given as prescribed in the by-laws. Copies of such amendment, signed and acknowledged by not less than three directors, shall be filed and recorded in the manner, and in the respective offices, prescribed in section four for the articles of association.

SECTION 6. Upon the filing by the [proper county officer] of a copy of the articles of association, transmitted to him by the [proper State officer], as prescribed in section four of this act, the association shall have power, within the limitations of this act—

(*a*) To adopt and use a common seal and to alter it at pleasure;

(*b*) To have succession for the term prescribed in its articles of association, unless sooner dissolved by operation of law or under the provisions of this act;

(*c*) To perform for members the services described in its articles of association;

(*d*) To make contracts necessary in the conduct of its operations;

(*e*) To purchase, lease, or receive by gift, bequest, or devise, and to hold personal and real property necessary in the conduct of its operations, and to dispose of the same;

(*f*) To borrow money necessary in the conduct of its operations, to issue notes and bonds therefor, and to give security, in the form of mortgage or otherwise, for the repayment thereof;

(*g*) To sue and be sued by the name specified in its articles of association, as fully as natural persons;

(*h*) To adopt, and alter or amend when necessary, by-laws, not inconsistent with law, regulating its conduct and management;

(*i*) To elect a board of directors, which shall have power to appoint a president, vice president, secretary, treasurer, and other officers, and agents and employees deemed necessary, to prescribe their duties not inconsistent with the by-laws, to require bonds of them and fix the penalty thereof, and to dismiss at pleasure any agent or employee;

(*j*) To coöperate, through membership or otherwise, with any other association not conducted for profit, whether formed under this act or otherwise, for the purpose of promoting any enterprise, which may be lawfully carried on, relating to the respective authorized operations of such associations, and which enterprise does not relate to or involve fixing wages, limiting production, destroying products, or fixing the selling price, or delegating the control, of the products of the members of either association;

(*k*) To foster membership in the association by advertising or by educational or other lawful means;

(*l*) To exercise such incidental powers as shall be necessary in the conduct of its operations.

SECTION 7. Any association may admit as members, under terms and conditions prescribed in its by-laws, persons engaged in agriculture or horticulture. Any member shall forfeit his membership upon proof being made to the association that he has ceased to be engaged in agriculture or horticulture. For the purposes of this act a member, other than an individual, shall be represented by an individual associate, officer, or partner thereof, duly authorized.

SECTION 8. Every association shall issue a certificate of membership to each member. Such certificate of membership shall not be transferable, and no person who may acquire same by operation of law, or otherwise than as may be prescribed in this act and the articles of association and by-laws of the association, shall be entitled to become a member by virtue of such certificate.

SECTION 9. Each member shall be entitled to one vote only, and no vote by proxy shall be permitted. Except in case of the removal of a director or officer, as provided in section fifteen of this act, absent members may, under rules prescribed in the by-laws, be permitted to vote on specific questions by ballots transmitted to the secretary, or other proper officer of the association, by registered mail; and such ballots to be counted only in the meeting at the time at which such vote is taken.

SECTION 10. Each member shall be responsible, as his original liability, for his per capita share of all contracts, debts, and engagements of the association existing at the time he becomes a member and created during his membership; but if any member's share of such contracts,

debts and engagements shall prove to be uncollectable, each remaining member shall be responsible, as his additional liability, for such unpaid share or part thereof to an amount equal to such remaining member's original liability or to such further amount as may be prescribed in the articles of association. No member shall be liable to the association for any contract, debt or engagement arising out of any specific transaction between the association and any member or members thereof in which he does not participate unless and until the association shall have exhausted every legal recourse and failed to enforce satisfaction from the member or members participating therein. In all cases any member who, voluntarily or otherwise, contributes to the payment of the debt or obligation of another member or other members shall have an action, several or joint, as he may elect, against such defaulting member or members for reimbursement. Any association may, in its articles of association, limit the amount of indebtedness or obligation which may be incurred by or on behalf of the association, and no member shall be liable for any debt or obligation in excess of the terms of such limitations.

SECTION 11. The association, as agent for a nonmember, may buy farm supplies for him and sell his agricultural or horticultural products and, as a condition of its contract with such nonmember, may impose upon him any liability for the contracts, debts and engagements of the association which does not exceed the ability of a member; but in no case shall it charge a nonmember for such services more than the actual cost thereof, including the prorata part of all overhead expenses.

SECTION 12. Within [forty] days after the filing of a

copy of the articles of association in the [proper county office], as prescribed in section four of this act, a call, signed by not less than a majority of the directors, shall be issued for a meeting of the members. At such meeting, or any adjourned session or sessions thereof, by-laws regulating the conduct and management of the association shall be adopted. Such by-laws shall, within the limitations of this act, prescribe—

(*a*) The time, place, and manner of calling and holding meeting;

(*b*) The number and qualifications of members, the conditions under which membership shall be granted and terminated, rules governing the exercises of the privileges of membership and the issuance, transfer and cancellation of membership certificates, and the manner of ascertaining the interests of members in the assets, if any, in the possession of the association;

(*c*) The number of the directors, the time and manner of their election and removal, their powers and duties, the number not less than a majority, necessary to the exercise of their powers, and their compensation, if any;

(*d*) The officers, their terms of office, the time and manner of their appointment and removal, their powers and duties, and their compensation, if any;

(*e*) The manner of fixing and collecting fees, dues, and other assessments or charges for services to its members;

(*f*) Any other provisions proper and necessary to carry out the purposes for which the association was formed.

Section 13. The by-laws may require the members to sell all or any part of their specifically enumerated agricultural and horticultural products, and to buy all or any part of their specifically enumerated farm supplies,

exclusively through the association; but, in such case, shall specify a reasonable period, in each year, during which any member, by giving to the association the notice prescribed in the by-laws, may withdraw and be released, from his obligation to employ the services of the association in respect to such products and supplies. The by-laws may fix as liquidated damages, specific, reasonable sums, in amounts fairly related to the actual damages ordinarily suffered in like circumstances, to be paid to the association, to reimburse it for any damage which it or the members may sustain by the failure of any member to perform any obligation to the association under the articles of associatoin, the by-laws, or any contract with the association, and any such provision shall be valid and enforceable in the courts of this State.

Section 14. The board of directors of every association shall consist of not less than five members, who shall be divided, as nearly equally as practicable, into three classes. At the first regular meeting of the association, a quorum as prescribed by the by-laws being present, the members shall elect from among themselves directors of the first class for a term of one year, directors of the second class for a term of two years, and directors of the third class for a term of three years. At the expiration of the terms of the directors so elected their successors shall be elected, in like manner, for terms of three years. Directors shall hold office until their successors shall have been elected and qualified and shall enter upon the discharge of their duties. Vacancies shall be filled, for the unexpired terms, at any regular meeting, or at any special meeting called for the purpose, in the manner provided for the original election of directors. The board of directors shall manage the affairs of the association and shall

perform the duties specifically imposed upon the board by this act.

SECTION 15. Any director or officer of an association may, for cause, at any regular meeting or at any special meeting called for the purpose, at which a majority of the members shall be present, be removed from office by vote of not less than two-thirds of the members present. Reasonable notice of the time, place, and object of any such meeting shall be given, in the manner prescribed in the by-laws, to the members, and to the director or officer against whom charges are to be presented. Such director or officer shall, at the same time, be informed in writing of such charges, and at such meeting shall have an opportunity to be heard in person, by counsel, and by witnesses, in regard thereto.

SECTION 16. The officers of every association shall include a president, vice president, secretary, and treasurer, who shall be appointed annually by the board of directors. The president and vice president shall be appointed from among the directors. The secretary and treasurer may be nonmembers. The offices of secretary and treasurer may be combined and one individual appointed thereto. Vacancies shall be filled for the unexpired terms by the board of directors in the manner provided for the original appointment of officers. The board of directors shall require the treasurer and all other officers, agents, and employees charged by the association with responsibility for the custody of any of it funds or property to give bond with sufficient security for the faithful performance of their duties as such.

SECTION 17. An association may provide for the payment of expenses, necessary in the performance of its services to its members, by the creation of a working

fund or otherwise, through fees, dues, assessments, or charges for the services, to be fixed and collected in such manner as may be prescribed in the by-laws. Such fees, dues, assessments, or charges shall be limited to the amounts necessary to meet expenses already incurred, or reasonably estimated as essential to be incurred, by the association in conducting its operations. Whenever any association shall find that it has accumulated funds in excess of those necessary to meet expenses already incurred, or reasonably estimated as essential to be incurred, by it in conducting its operations, it shall return such excess to, or deduct it from future fees, dues, assessments, or charges of, the members who contributed to such excess, in the proportions of their respective contribution.

SECTION 18. Every association shall, from time to time, appoint a committee of three members, who shall not be directors, officers, agents, or employees of the association, which committee shall, at least once in each quarter of each fiscal or business year of such association, make an examination of its records and property, and shall, within one month after such examination, report in writing the results thereof to the association. Immediately after the close of each fiscal or business year of the association, a complete audit of its operations shall be made for the fiscal or business year. A written report of the audit, including statements of services rendered by the association, the balance sheet, receipts and disbursements, assets and liabilities, members admitted and withdrawn, total numbers of members, and other proper information, shall be submitted to the members at their next regular meeting. The association shall file copies of the report of the audit with the [proper State

official, such as the Secretary of State, and with the Director of Extension of the State Agricultural College, or the Commissioner of Agriculture, or the Dean of the State Agricultural College], within three months after the close of the fiscal or business year for which made. The [Director of Extension, etc.] shall, upon request, furnish a copy of such report to the United States Department of Agriculture. No person shall, without the consent of the association, except in obedience to judicial process, make or permit any disclosure whereby any information contained in said report may be identified as having been furnished by said association. Any person violating or failing to comply with these provisions of this section shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than [five hundred] dollars.

SECTION 19. Any association may, at any regular meeting or at any special meeting called for the purpose, due notice of the time, place and object of which regular or special meetings shall have been given as prescribed in the by-laws, by vote of two-thirds of all of the members, discontinue its operations and settle its affairs. Thereupon, it shall designate a committee of three members, who shall, on behalf of the association and within a time fixed in their designation, or any extension thereof, liquidate its assets, pay its debts and expenses, and divide any surplus among the members as they may be entitled under the articles of association or by-laws. Upon final settlement by such committee, the association shall be deemed dissolved, and shall cease to exist under this act. The committee shall make a report of the proceedings had under this section, which shall be signed by its members, shall be acknowledged by them before

an officer duly authorized to administer oaths in this State, and shall be filed and recorded in compliance with the provisions of section four of this act with respect to articles of association.

SECTION 20. Every association shall, before any paper is filed and recorded as required by this act, pay the fees specified in this section for such filing and recording:
To the [proper State officer] as follows:

Articles of association, mentioned in section four, ——.

Amendments to articles of association, mentioned in section five, ——.

Report of proceedings under section nineteen, ——.

To the [proper county officer in the county in which filed and recorded] as follows:

Articles of association, mentioned in section four, ——.

Amendments to articles of association, mentioned in section five, ——.

Report of proceedings under section nineteen, ——.

SECTION 21. Hereafter, unless expressly authorized by law, no individual or partnership, nor any corporation or association formed in this State otherwise than as provided in this act, shall adopt and use the word "co-operative," or any abbreviation or derivative thereof, as a part of the name or designation under which such individual, partnership, corporation, or association shall do business in this State. Any association shall be entitled to sue for, and to obtain in any court by competent jurisdiction in this State, injunctive relief against the use of the word "coöperative" by any individual, firm, corporation, or association who shall violate the provisions of this section.

SECTION 22. Every person now doing, or hereafter commencing to do, business in this State under the name or designation which includes the word "coöperative," or any abbreviation or derivative thereof, shall, within [ninety] days after the passage of this act, or before so commencing to do business, file with the [proper State officer], in such form as he may require, a statement showing such name. Hereafter no person shall commence to do business in this State under a name or designation which includes the word "coöperative," or any abbreviation or derivative thereof, if such name or designation be the same as that of any existing association, or so similar to such name as to be likely to be confused therewith. Any person violating or failing to comply with the provisions of this section shall be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than [five hundred] dollars.

SECTION 23. If any clause, sentence, paragraph, or part of this act shall, for any reason, be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

SECTION 24. [Here insert any necessary repeal clause applicable to prior legislation.]

SECTION 25. The right to alter, amend, or repeal this act, is hereby expressly reserved.

APPENDIX D

THE BINGHAM CO-OPERATIVE MARKETING ACT

CHAPTER 1
Acts of Kentucky, 1922

1. Declaration of policy. (a) In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation; and to eliminate speculation and waste; and to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; and to stabilize the marketing of agricultural products, this act is passed.

2. Definitions. As used in this act,

(a) The term "agricultural products" shall include horticultural, viticultural, forestry, dairy, live stock, poultry, bee and any farm products.

(b) The term "member" shall include actual members of associations without capital stock and holders of common stock in associations organized with capital stock.

(c) The term "association" means any corporation organized under this act; and

(d) The term "person" shall include individuals, firms, partnerships, corporations and associations.

Associations organized hereunder shall be deemed "non-profit," inasmuch as they are not organized to make

profit for themselves, as such, or for their members, as such, but only for their members as producers.

(e) For the purposes of brevity and convenience this act may be indexed, referred to and cited as "The Bingham Co-operative Marketing Act."

3. **Who may organize.** Twenty (20) or more persons, a majority of whom are residents of this State, engaged in the production of agricultural products, may form a non-profit, co-operative association, with or without capital stock, under the provisions of this act.

4. **Purposes.** An association may be organized to engage in any activity in connection with the marketing or selling of the agricultural products of its members, or with the harvesting, preserving, drying, processing, canning, packing, grading, storing, handling, shipping or utilization thereof, or the manufacturing or making of the by-products thereof; or in connection with the manufacturing, selling or supplying to its members of machinery, equipment or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein.

5. **Preliminary investigation.** Every group of persons contemplating the organization of an association under this act is urged to communicate with the Dean of the College of Agriculture of the University of Kentucky, who will inform them whatever a survey of the marketing conditions affecting the commodities proposed to be handled may indicate regarding probable success.

It is here recognized that agriculture is characterized by individual production in contrast to the group or factory system the characterizes other forms of industrial production; and that the ordinary form of corporate organization permits industrial groups to combine for the

purpose of group production and the ensuing group marketing and that the public has an interest in permitting farmers to bring their industry to the high degree of efficiency and merchandising skill evidenced in the manufacturing industries; and that the public interest urgently needs to prevent the migration from the farm to the city in order to keep up farm production and to preserve the agricultural supply of the nation; and that the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind, unscientific and speculative selling of crops; and that for this purpose, the farmers should secure special guidance and instructive data from the Dean of the College of Agriculture of the University of Kentucky.

6. **Powers.** Each association incorporated under this act shall have the following powers:

(a) To engage in any activity in connection with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, grading, sorting, handling or utilization of any agricultural products produced or delivered to it by its members; or the manufacturing or marketing of the by-products thereof; or any activity in connection with the purchase, hiring, or use by its members of supplies, machinery or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. No association, however, shall handle the agricultural products of any non-member, except for storage.

(b) To borrow money without limitation as to amount to corporate indebtedness or liability; and to make advances to members.

(c) To act as the agent or representative of any mem-

ber or members in any of the above mentioned activities.

(d) To purchase or otherwise acquire; and to hold, own, and exercise all rights of ownership in; and to sell, transfer or pledge, or guarantee the payment of dividends or interest on, or the retirement or redemption of, shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the warehousing or handling or marketing of any of the products handled by the association.

(e) To establish reserves and to invest the funds thereof in bonds or in such other property as may be provided in the by-laws.

(f) To buy, hold and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conduct and operation of any of the business of the association, or incidental thereto.

(g) To do each and every thing necessary, suitable or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the subjects herein enumerated; or conducive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition to exercise and possess all powers, rights and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and, in addition, any other rights, powers and privileges granted by the laws of this State to ordinary corporations, except such as are inconsistent with the express provisions of this act; and to do any such thing anywhere.

7. **Members.** (a) Under the terms and conditions prescribed in the by-laws adopted by it, an association may admit as members, or issue common stock to, per-

sons only engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent all or part of the crop raised on the leased premises.

(b) If a member of a non-stock association be other than a natural person, such member may be represented by any individual, associate, officer or manager or member thereof, duly authorized in writing.

(c) One association organized hereunder may become a member or stockholder of any other association or associations organized hereunder.

8. **Articles of incorporation.** Each association formed under this act must prepare and file articles of incorporation, setting forth:

(a) The name of the association.

(b) The purposes for which it is formed.

(c) The place where its principal business will be transacted.

(d) The term for which it is to exist, not exceeding fifty (50) years.

(e) The number of directors thereof, which must be not less than five (5) and may be any number in excess thereof; the term of office of such directors; and the names and addresses of those who are to serve as incorporating directors for the first term, or until election and qualification of their successors.

(f) If organized without capital stock, whether the property rights and interests of each member shall be equal or unequal; and if unequal, the general rule or rules applicable to all members by which the property rights and interests, respectively, of each member may

and shall be determined and fixed; and provision for the admission of new members who shall be entitled to share in the property of the association with the old members, in accordance with such general rule or rules. This provision or paragraph of the articles of incorporation shall not be altered, amended, or repealed except by the written consent or vote of three-fourths of the members.

(g) If organized with capital stock, the amount of such stock and the number of shares into which it is divided and the par value thereof.

The capital stock may be divided into preferred and common stock, if so divided, the articles of incorporation must contain a statement of the number of shares of stock to which no preference is granted and the nature and definite extent of the preference and privileges granted to each.

The articles must be subscribed by the incorporators and acknowledged by one of them before an officer authorized by the law of this State to take and certify acknowledgments of deeds and conveyances; and shall be filed in accordance with the provisions of the general corporation law of this State; and when so filed the said articles of incorporation, or certified copies thereof, shall be received in all the courts of this State and other places, as prima facie evidence of the facts contained therein and of the due incorporation of such association. A certified copy of the articles of incorporation shall also be filed with the Dean of the College of Agriculture of the University of Kentucky.

9. Amendments to articles of incorporation. The articles of incorporation may be altered or amended at any regular meeting or any special meeting called for that purpose. An amendment must first be approved by

two-thirds of the directors and then adopted by a vote representing a majority of all the members of the association. Amendments to the articles of incorporation, when so adopted, shall be filed in accordance with the provisions of the general corporation law of this State.

10. By-laws. Each association incorporated under this act must, within thirty (30) days after its incorporation, adopt for its government and management, a code of by-laws, not inconsistent with the powers granted by this act. A majority vote of the members or stockholders, or their written assent, is necessary to adopt such by-laws. Each association, under its by-laws, may provide for any or all of the following matters:

(a) The time, place and manner of calling and conducting its meetings.

(b) The number of stockholders or members constituting a quorum.

(c) The right of members or stockholders to vote by proxy or by mail or both; and the conditions, manner, form, and effects of such votes.

(d) The number of directors constituting a quorum.

(e) The qualifications, compensation and duties and term of office of directors and officers; time of their election and the mode and manner of giving notice thereof.

(f) Penalties for violations of the by-laws.

(g) The amount of entrance, organization and membership fees, if any; the manner and method of collection of the same; and the purposes for which they may be used.

(h) The amount which each member or stockholder shall be required to pay annually or from time to time, if at all, to carry on the business of the association; the charge, if any, to be paid by each member or stockholder

for services rendered by the association to him and the time of payment and the manner of collection; and the marketing contract between the association and its members or stockholders which every member or stockholder may be required to sign.

(i) The number and qualification of members or stockholders of the association and the conditions precedent to membership or ownership of common stock; the method, time and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members and of the shares of common stock; the conditions upon which and time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association; and the mode, manner and effect of the expulsion of a member; the manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or stockholder, or upon the expulsion of a member or forfeiture of his membership, or, at the option of the association, the purchase at a price fixed by conclusive appraisal by the board of directors. In case of the withdrawal or expulsion of a member, the board of directors shall equitably and conclusively appraise his property interests in the association and shall fix the amount thereof in money, which shall be paid to him within one year after such expulsion or withdrawal.

11. General and special meetings—how called. In its by-laws, each association shall provide for one or more regular meetings annually. The board of directors shall have the right to call a special meeting at any

time; and ten per cent of the members or stockholders may file a petition stating the specific business to be brought before the association and demand a special meeting at any time. Such meeting must thereupon be called by the directors. Notice of all meetings, together with a statement of the purposes thereof, shall be mailed to each member at least ten days prior to the meeting; provided, however, that the by-laws may require instead that such notice may be given by publication in a newspaper of general circulation, published at the principal place of business of the association.

12. **Directors—election.** The affairs of the association shall be managed by a board of not less than five directors, elected by the members or stockholders from their own number. The by-laws may provide that the territory in which the association has members shall be divided into districts and that the directors shall be elected according to such districts, either directly or by district delegates elected by the members in that district. In such a case the by-laws shall specify the number of directors to be elected by each district, the manner and method of reapportioning the directors and of redistricting the territory covered by the association. The vided into districts and that the directors shall be held in each district to elect the directors apportioned to such districts and that the result of all such primary elections may be ratified by the next regular meeting of the association or may be considered final as to the association.

The by-laws may provide that one or more directors may be appointed by any public official or commission or by the other directors selected by the members or their delegates. Such directors shall represent primarily

the interest of the general public in such associations. The director or directors so appointed need not be members or stockholders of the association; but shall have the same powers and rights as other directors. Such directors shall not number more than one-fifth of the entire number of directors.

An association may provide a fair remuneration for the time actually spent by its officers and directors in its service and for the service of the members of its executive committee. No director, during the term of his office, shall be a party to a contract for profit with the association differing in any way from the business relations accorded regular members or holders of common stock of the association or others, or differing from terms generally current in that district.

The by-laws may provide for an executive committee and may allot to such committee all the functions and powers of the board of directors, subject to the general direction and control of the board.

When a vacancy on the board of directors occurs other than by expiration of term, the remaining members of the board, by a majority vote, shall fill the vacancy, unless the by-laws provide for an election of directors by district. In such a case the board of directors shall immediately call a special meeting of the members or stockholders in that district to fill the vacancy.

13. Election of officers. The directors shall elect from their number a president and one or more vice presidents. They shall also elect a secretary and a treasurer, who need not be directors or members of the association; and they may combine the two latter offices and designate the combined office as secretary-treasurer; or unite both functions and titles in one person. The treasurer may

be a bank or any depository, and as such, shall not be considered as an officer, but as a function, of the board of directors. In such case, the secretary shall perform the usual accounting duties of the treasurer, excepting that the funds shall be deposited only as and where authorized by the board of directors.

14. Stock—membership certificate—when issued—voting—liability—limitations on transfer and ownership. When a member of an association established without capital stock has paid his membership fee in full, he shall receive a certificate of membership.

No association shall issue stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment. The association shall hold the stock as security for the payment of the note; but such retention as security shall not affect the member's right to vote.

No member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof.

No stockholder of a co-operative association shall own more than one-twentieth (1/20) of the common stock of the association; and an association, in its by-laws, may limit the amount of common stock which one member may own to any amount less than one-twentieth (1/20) of the common stock.

No member or stockholder shall be entitled to more than one vote, regardless of the number of shares of common stock owned by him.

Any association organized with stock under this act

may issue preferred stock, with or without the right to vote. Such stock may be redeemable or retirable by the association on such terms and conditions as may be provided for by the articles of incorporation and printed on the face of the certificate.

The by-laws shall prohibit the transfer of the common stock of the association to persons not engaged in the production of the agricultural products handled by the association; and such restrictions must be printed upon every certificate of stock subject thereto.

The association may, at any time, as specified in the by-laws, except when the debts of the association exceed fifty (50) per cent of the assets thereof, buy in or purchase its common stock at the book value thereof, as conclusively determined by the board of directors, and pay for it in cash within one (1) year thereafter.

15. Removal of officer or director. Any member may bring charges against an officer or director by filing them in writing with the secretary of the association, together with a petition signed by five per cent of the members, requesting the removal of the officer or director in question. The removal shall be voted upon at the next regular or special meeting of the association and, by a vote of a majority of the members, the association may remove the officer or director and fill the vacancy. The director or officer, against whom such charges have been brought, shall be informed in writing of the charges previous to the meeting and shall have an opportunity at the meeting to be heard in person or by counsel and to present witnesses; and the person or persons bringing the charges against him shall have the same opportunity.

In case the by-laws provide for election of directors by

districts with primary elections in each district, then the petition for removal of a director must be signed by twenty per cent of the members residing in the district from which he was elected. The board of directors must call a special meeting of the members residing in that district to consider the removal of the director; and by a vote of the majority of the members of that district, the director in question shall be removed from office.

16. Referendum. Upon demand of one-third of the entire board of directors, any matter that has been approved or passed by the board must be referred to the entire membership or the stockholders for decision at the next special or regular meeting; provided, however, that a special meeting may be called for the purpose.

17. Marketing contract. The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over ten years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association, or any facilities to be created by the association. If they contract a sale to the association, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded liens, to the association upon delivery; or at any other specified time if expressly and definitely agreed in the said contract. The contract may provide that the association may sell or resell the products delivered by its members, with or without taking title thereto; and pay over to its members, the resale price, after deducting all necessary selling, overhead and other costs and expenses, including interest on preferred stock, not exceeding eight (8) per cent per annum, and reserves for retiring the stock, if any; and other proper reserves;

and interest not exceeding eight (8) per cent per annum upon common stock.

18. Remedies for breach of contract. (a) The by-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees, in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts of this State; and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties.

(b) In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof. Pending the adjudication of such an action and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member.

(c) In any action upon such marketing agreements, it shall be conclusively presumed that a landowner or landlord or lessor is able to control the delivery of products produced on his land by tenants or others, whose tenancy or possession or work on such land or the terms of whose tenancy or possession or labor thereon were created or changed after execution by the landowner or landlord or lessor, of such a marketing agreement; and

in such actions, the foregoing remedies for non-delivery or breach shall lie and be enforceable against such landowner, landlord or lessor.

19. Purchasing business of other associations, persons, firms or corporations—payment—stock issued. Whenever an association, organized hereunder with preferred capital stock, shall purchase the stock or any property, or any interest in any property of any person, firm or corporation or association, it may discharge the obligations so incurred, wholly or in part, by exchanging for the acquired interest, shares of its preferred capital stock to an amount which at par value would equal the fair market value of the stock or interest so purchased, as determined by the board of directors. In that case the transfer to the association of the stock or interest purchased shall be equivalent to payment in cash for the shares of stock issued.

20. Annual reports. Each association formed under this act shall prepare and make out an annual report on forms to be furnished by the Dean of the College of Agriculture of the University of Kentucky, containing the name of the association; its principal place of business; and a general statement of its business operations during the fiscal year, showing the amount of capital stock paid up and the number of stockholders of a stock association or the number of members and amount of membership fees received, if a non-stock association; the total expenses of operations; the amount of its indebtedness or liabilities, and its balance sheets.

21. Conflicting laws not to apply. Any provisions of law which are in conflict with this act shall not be construed as applying to the associations herein provided for.

Any exemptions under any and all existing laws applying to agricultural products in the possession or under the control of the individual producer, shall apply similarly and completely to such products delivered by its farmer members, in the possession or under the control of the association.

22. Limitations of the use of term "co-operative." No person, firm, corporation or association, hereafter organized or doing business in this State, shall be entitled to use the word "co-operative" as part of its corporate or other business name or title for producers' co-operative marketing activities, unless it has complied with the provisions of this act.

Any person, firm, corporation or association now organized and existing, or doing a producers' co-operative marketing business in this State and embodying the word "co-operative" as part of its corporate or other business name or title, and which is not organized in compliance with the provisions of this act, must, within six months from the date at which this act goes into effect, eliminate the word "co-operative" from its said corporate or other business name or title.

23. Interest in other corporations or associations. An association may organize, form, operate, own, control, have an interest in, own stock of, or be a member of any other corporation or corporations, with or without capital stock, and engaged in preserving, drying, processing, canning, packing, storing, handling, shipping, utilizing, manufacturing, marketing or selling of the agricultural products handled by the association, or the by-products thereof.

If such corporations are warehousing corporations, they may issue legal warehouse receipts to the associa-

tion against the commodities delivered by it, or to any other person and such legal warehouse receipts shall be considered as adequate collateral to the extent of the usual and current value of the commodity represented thereby. In case such warehouse is licensed or licensed and bonded under the laws of this State or the United States, its warehouse receipt delivered to the association on commodities of the association or its members, or delivered by the association or its members, shall not be challenged or discriminated against because of ownership or control, wholly or in part, by the association.

24. Contracts and agreements with other associations. Any association may, upon resolution adopted by its board of directors, enter into all necessary and proper contracts and agreements and make all necessary and proper stipulations, agreements and contracts and arrangements with any other co-operative corporation, association or associations, formed in this or in any other state, for the co-operative and more economical carrying on of its business or any part or parts thereof. Any two or more associations may, by agreement between them, unite in employing and using or may separately employ and use the same personnel, methods, means and agencies for carrying on and conducting their respective businesses.

25. Associations heretofore organized may adopt the provisions of this act. Any corporation or association, organized under previously existing statutes, may, by a majority vote of its stockholders or members, be brought under the provisions of this act by limiting its membership and adopting the other restrictions as provided herein. It shall make out in duplicate a statement signed and sworn to by its directors to the effect that the

corporation or association has, by a majority vote of its stockholders or members, decided to accept the benefits and be bound by the provisions of this act and has authorized all changes accordingly. Articles of incorporation shall be filled as required in section 8, except that they shall be signed by the members of the then board of directors. The filing fee shall be the same as for filing an amendment to articles of incorporation.

(a) Where any association may be incorporated under this act, all contracts heretofore made by or on behalf of same by the promoters thereof in anticipation of such association becoming incorporated under the laws of this State, whether such contracts be made by or in the name of some corporation organized elsewhere and when same would have been valid if entered into subsequent to the passage of this act, are hereby validated as if made after the passage of this act.

26. Misdemeanor to induce breach of marketing contract of co-operative association; spreading false reports about the finances or management thereof. Any person or persons or any corporation whose officers or employees knowingly induce or attempt to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spread false reports about the finances or management thereof, shall be guilty of a misdemeanor and be subject to a fine of not less than one hundred ($100) dollars and not more than one thousand ($1,000) dollars for each such offense; and shall be liable to see the association aggrieved in a civil suit in the penal sum of five hundred ($500) dollars for each such offense.

27. Warehousemen liable for damages for encouraging or permitting delivery of products in violation of marketing agreements. Any person, firm or corporation conducting a warehouse within the State of Kentucky who solicits or persuades or permits any member of any association organized hereunder to breach his marketing contract with the association by accepting or receiving such member's products for sale or for auction or for display for sale, contrary to the terms of any marketing agreement of which said person or any member of the said firm or any active officer or manager of the said corporation has knowledge or notice, shall be liable to the association aggrieved in a civil suit in the penal sum of $500.00 for each such offense; and such association shall be entitled to an injunction against such warehouseman to prevent further breaches and a multiplicity of actions thereon. In addition, said warehouseman shall pay to the association a reasonable attorney's fee and all costs involved in any such litigation or proceedings at law.

This section is enacted in order to prevent a recurrence or outbreak of violence and to give marketing associations an adequate remedy in the courts against those who encourage violations of co-operative contracts.

28. Associations are not in restraint of trade. Any association organized hereunder shall be deemed not to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this State; and the marketing contracts and agreements between the association and its members and any agreements authorized in this act shall be considered not to be illegal

nor in restraint of trade nor contrary to the provisions of any statute enacted against pooling or combinations.

29. Constitutionality. If any section of this act shall be declared unconstitutional for any reason, the remainder of the act shall not be affected thereby.

30. Application of general corporation laws. The provisions of the general corporation laws of this State and all powers and rights thereunder, shall apply to the associations organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this act.

31. Taxation. The shares of corporations organized under this act shall be taxable as against the owner thereof as of the period of assessment of other personal property for taxation in this State.

Such shares will represent in the aggregate all the property held or owned by such corporation, and when taxed as against the individual owner, all of the property in the name of said association will thereby be taxed.

Under existing law, crops grown in the year of assessment are exempt from tax whilst owned by the producer. So much of the value of each share of said stock as may represent the owner's proportion of crops grown by him and delivered to the association as herein provided, shall be exempt from taxation, inasmuch as it is the same thing exempted now by the Constitution and laws of this State to such grower.

32. Filing Fees. For filing articles of incorporation, an association organized hereunder shall pay ten (10) dollars; and for filing an amendment to the articles, two dollars and fifty cents.

33. WHEREAS, the agricultural interests of the State are of the utmost importance to the people of Kentucky; and

WHEREAS, a demoralized condition of the farming interests of the State exists, injuriously affecting all other business; and

WHEREAS, the highest interests of the State generally, demand immediate relief; and

WHEREAS, this act is designed and intended to afford such relief,

THEREFORE, an emergency is declared to exist and this act shall become effective immediately upon its passage and approval as required by law.

APPENDIX E

THE DEPARTMENT OF AGRICULTURE CONTRACT FORM

THE.....COOPERATIVE ASSOCIATION

STANDARD FORM OF CROP CONTRACT

THIS AGREEMENT, made and entered into at .....on this.....day of ....., A. D. 19..., between the..... .....Association, formed under the laws of the State of....., having its principal place of business at..... in the said State (hereinafter referred to as the Association) and....., a grower of (Fruits and Vegetables) of....., County of....., State of..... (hereinafter referred to as the Grower), witnesseth:

That for and in consideration of the expenses to be incurred by the Association in providing means and facilities for handling, storing, and marketing (Fruits and Vegetables), including the expense of locating, organizing and establishing markets, and in further consideration of the mutual obligations and promises of the respective parties hereto, it is hereby agreed as follows:

1. That the Grower appoints said Association his agent, and the Association hereby agrees to act as such for the purpose of handling, packing, storing, and marketing all the (Fruits and Vegetables) which shall be

grown for shipment and sale by the Grower or for him, whether as landlord or tenant, or otherwise, upon that certain tract of land situated in the County of.....
....., State of....., described as follows, to-wit: .....
.....
.....
and that he will harvest and will deliver all his marketable (Fruits and Vegetables) at the Association's shipping station at.....in said State, in such quantities and condition and at such times as the Association, or its agent, may direct, during the year 19... and every year thereafter continually. On or before (April 1) of each year the Grower shall report to the Association the acreage to be grown by him during that year of (Fruits and Vegetables) covered by this contract. During the growing season the Grower shall also furnish such information concerning said (Fruits and Vegetables) as may be requested by the Association.

2. That either party may cancel this contract on the first day of (April)* of any year by giving notice in writing to that effect to the other party at least thirty (30) days prior to said date. Upon such notice, the Grower shall, prior to said first day of (April) pay any indebtedness then due from him to the Association and deliver his copy of said contract to the Association; such cancellation shall not affect any incompleted sales or transactions between the parties hereto nor release either from any indebtedness then unpaid or hereafter accruing under this contract, nor relieve the Grower from his obligation to sell through the Association nor the Asso-

*This date should, if possible, be after the closing of one season's business and before the opening of the next.

ciation of its obligation to handle, all the (Fruits and Vegetables) described in Section 1 which were grown during the preceding season. It is expressly agreed that this contract shall be binding upon the legal representatives of the Grower.

3. That harvesting, grading, inspecting, packing, storing, and shipping of the (Fruits and Vegetables) shall be done in accordance with the by-laws and rules of the Association now in existence or hereafter in effect.

4. That all (Fruits and Vegetables) delivered by the Grower may be marketed in assorted lots or with other (Fruits and Vegetables) of like character and the proceeds of any or all shipments may be prorated with the proceeds of any other (Fruits and Vegetables) of like variety and grade marketed by the Association, during such period or periods as the Board of Directors from time to time may determine.

5. That the Association shall have a lien upon the (Fruits and Vegetables) hereby contracted by the Grower to be delivered to the Association for any indebtedness of any kind owing by him to the Association, and any such indebtedness shall be deducted out of the net proceeds of the sale of such (Fruits and Vegetables).

6. That the Grower will not sell or otherwise dispose of his (Fruits and Vegetables) covered by this contract to any purchaser except through the Association, unless such (Fruits and Vegetables) be rejected by the Association. In case the Grower is offered a price in excess of the price then obtainable by the Association, he shall turn over the offer to the Association to be filled by it from the Grower's (Fruits and Vegetables) covered by this contract.

7. That the (Fruits and Vegetables) covered by this

contract shall be marketed by the Association wherever a market may be found which in its judgment and in accordance with its by-laws and rules shall justify such marketing. The Association shall not be liable for any damage that may be sustained through act of God or public enemy, or accidents in shipment or storage, or unavoidable failure to secure suitable storage or markets for the proper handling and storing and marketing of said (Fruits and Vegetables). Any loss occasioned by the Grower shall be borne by him.

8. That the Grower will pay the Association its regular charges for its services, including handling, storing, shipping, and marketing, which charges are to be fixed by the Board of Directors of the Association, and which shall be in amount sufficient to pay all expenses of rendering such service, including the overhead expenses of the Association. The Grower gives the Association the right to deduct the amount necessary to cover such charges from the returns received for his (Fruits and Vegetables).

9. Any member who fails to live up to his agreement, or fails or refuses to deliver his (Fruits and Vegetables) to the Association for sale in accordance with said agreement shall pay to the Association as liquidated damages the sum of.....for each..... of.....not delivered by him to compensate the Association for the loss sustained by the breach, and to enable it to meet and equitably distribute overhead and maintenance expenses involved in the operation of the Association and in providing and maintaining facilities for handling and marketing the (Fruits and Vegetables) of its members; said sum may be deducted from any money due the member in the posses-

sion of the Association. This contract contemplates the delivery of the (Fruits and Vegetables) covered thereby, and not the payment of liquidated damages in lieu thereof.

10. That the Association shall have power, without limitation, to borrow money in its name and on its own account on the (Fruits and Vegetables) consigned to it, products manufactured therefrom, or on any accounts of the sale thereof, or any drafts, bills of lading, bills of exchange, notes, acceptances, or any commercial paper held by it, and to exercise all rights of ownership without limitation, and to pledge in its own name and on its own account drafts, bills of lading, bills of exchange, notes, acceptances, or any commercial paper as collateral.

11. That there are no oral, or any other conditions, promises, covenants, representations or inducements in addition to, or at variance with any terms hereof, and that this agreement represents the voluntary and clear understanding of both parties fully and completely.

IN WITNESS WHEREOF, the said parties have executed this contract in duplicate,

.....
Grower
.....COOPERATIVE ASSOCIATION
By.....
President.

Attest:

.....
Secretary.

APPENDIX F

CONTRACT RECOMMENDED BY CALIFORNIA FRUIT GROWERS' EXCHANGE FOR USE BETWEEN ASSOCIATIONS AND GROWERS

THIS AGREEMENT Made the.....day of ....., A. D. 191.., between the ..... Association, a corporation incorporated under the laws of the State of California, and having its principal place of business at....., in said State, and affiliated with the California Fruit Growers Exchange, a corporation incorporated under said laws for the purpose of marketing California citrus fruits, the party of the first part, and the undersigned citrus fruit growers of..... said State, the parties of the second part,

WITNESSETH:

SALE AND DELIVERY OF FRUIT

1. That, for and in consideration of the sum of one dollar, the receipt of which is hereby acknowledged by each of the second parties, and of the covenants and agreements herein contained, each of the second parties hereby sells and conveys, and agrees to pick, haul and deliver to the first party, at its packing house at ....., in said State, for the purpose of packing, selling and marketing, all the citrus fruits now growing upon his land and premises, and all that, during the term of this agreement, may be grown upon his

lands and premises, or any other lands or premises owned by him and situated in the County of....., said State, at such time or times, and from time to time, and in such quantities, as the first party, or its agent, may direct.

PACKING AND MARKETING

2. The first party agrees to receive, pack, sell and market all of said fruit whenever a market may be found for the same, which in the judgment of the first party and in accordance with its rules and regulations, shall justify such selling and shipment.

PROCEEDS

3. The first party agrees to pay to each of the second parties the amount received for his said fruit, less its regular charges for packing, shipping, selling and marketing the same.

WITHDRAWAL OF LAND

4. If any of the second parties shall, in good faith, sell his said lands, or any part thereof, he shall be released from this agreement as to all lands sold and conveyed, upon giving notice in writing thereof to the first party.

TERM OF AGREEMENT

5. This agremeent shall continue in full force and effect from the date hereof until November 1st of the year of the date hereof, and for a further term next thereafter or five (5) years.

SUSPENSION OF AGREEMENT

6. Any of the second parties to this agreement may be released therefrom and terminate and end the same as to him, by filing a written notice of his desire to be so released, with the party of the first part, during the

first fifteen (15) days of August of any year during the term of this agreement.

BY-LAWS

7. The by-laws of the first party and the contract between the first party and its local exchange and the contract between such local exchange and the California Fruit Growers Exchange shall be parts of this agreement and shall be binding upon each of the second parties except in those particulars in which it is expressly herein stipulated to the contrary.

RULES AND REGULATIONS

8. The packing, selling and marketing of the said fruit shall be done in accordance with the rules and regulations of the first party now or hereafter adopted and observed by it.

PURPOSE—POSSESSION

9. Each of the second parties fully understands that the purpose, among others, of this agreement, is to maintain and to increase to its greatest efficiency the present co-operative fruit selling and marketing agency known as the California Fruit Growers Exchange, whose stockholders are the representatives of various sub-exchanges, and the stockholders of which said sub-exchanges are the representatives of the various and numerous fruit associations of the State of California, of which the first party is one; and that to accomplish this purpose it is necessary that each of the parties of the second part shall strictly and fully comply with and perform the stipulations of this agreement on his part, and therefore, each of the second parties expressly stipulates and agrees that he will not sell or otherwise dispose of his said fruit to any person or corporation other than to

said first party, as herein provided; and that in case he shall fail, refuse or delay to pick and deliver his said fruit to the first party, within five (5) days after demand therefor, the first party shall have the right, at its option, at any time or times thereafter, and from time to time, to enter into the possession of his said premises and to pick his said fruit, or any part thereof, and take the same to the packing house of the first party, and pack, sell and market the same, all at his cost and expense, which said cost and expense shall and may be retained by the first party out of any monies received from the sale of any of his fruit.

LIQUIDATED DAMAGES

10. The actual damages which will be sustained by the first party because of the failure or refusal of any of the second parties to pick and deliver his said fruit as herein provided, and the further detriment and injury to the first party because of the effect of said breach upon the California Fruit Growers Exchange and its efficiency, and the expenses to which the first party will be put and the damage caused by outlays incurred and to be incurred by it in providing means for selling and marketing the said fruit, are impossible now to estimate or fix, and, therefore, the same are estimated and agreed upon as twenty-five cents (25c) for each box of fruit grown or sold, which sum shall be allowed in any action brought by the first party to recover damages for the breach of this agreement by any of the second parties, should the first party elect, as it may elect, to bring such action.

IN WITNESS WHEREOF, the said corporations have each hereunto caused its corporate name and seal to be

affixed by its President and Secretary duly authorized by resolution of its Board of Directors, duly passed and adopted, and all other parties have hereunto signed their individual names and affixed their individual seals.

.....Association,

By.....
President.

By.....
Secretary.

..... owning ..... acres.

..... owning ..... acres.

APPENDIX G

SERVICE AND MAINTENANCE AGREEMENT

THIS AGREEMENT, made and entered into at..... on this ..... day of ....., A. D. 19..., between [The ..... Grain Growers' Cooperative Association], a corporation organized and existing under the laws of the State of ....., having its principal place of business at ....., in said State, hereinafter called the Association, and ..... of ..... County, ..., hereinafter called the Grower, witnesseth:

THAT FOR AND IN CONSIDERATION—

1. That the Association shall establish, equip, and maintain an office and grain elevator at ....., ..., and there provide equipment, facilities, and means for weighing, grading, shipping, and handling wheat, corn, oats, and barley of different variety and grade.

2. That the Association shall there provide and have available to the Grower, market news and other information concerning the values and market condition of wheat, corn, oats, and barley, of different variety and grade, and shall furnish the same to the Grower on request.

3. That the Association shall there employ and have available to the Grower the services of an elevator Manager whose duty it shall be to secure and to furnish to the Grower upon request, in so far as it is practicable, all

special market news, and other information and advice which the Grower may require relative to the marketing of grain and the procurement of seed grain.

4. That the Association shall weight and grade any and all grain of the kinds herein described, whether sold to or marketed through the Association, or to or through any other dealer or agency, which the Grower shall present for weighing and grading at the Association's office at .....

THE GROWER AGREES to pay the Association for such advantages, privileges, use, market news information, and weighing and grading service at the rate of [one cent] per bushel for each and every bushel of wheat, corn, oats, and barley which the Grower shall sell or market either directly or indirectly to or through the Association or to or through any other dealer or agency during the life of this contract. Such charge shall become due and payable immediately upon the sale or delivery of any and all grain, but shall not be applied to any grain which the said Grower shall have grown or come into possession of in territory not tributary to the shipping points of the Association.

IT IS MUTUALLY AGREED that upon all grain which the Grower shall sell to the Association or which he shall require the Association to handle through its elevator and warehouse at ....., ..., the charge of [one cent] per bushel herein stipulated to be paid shall not be in addition to, but shall be a part of the whole charge or charges which may hereafter be established for elevation and loading and for other services and handling.

IT IS FURTHER AGREED that either party may terminate this contract on the first day of [July] of any year

by giving notice in writing to the other party at least [ten] days prior to said date of the intent to so terminate. Termination shall then be effective on the said [first day of July], otherwise the contract shall continue in full force and effect so long as the Grower shall reside in territory tributary to the Association's office and shipping points, or shall continue to market any wheat, corn, oats, or barley in said territory.

IN WITNESS WHEREOF the said parties have executed these presents in duplicate the day and year first above written.

[The ..... Grain Growers' Cooperative Association.]

By .....,
President.

.....,
Grower.

Witness:

.....

APPENDIX H

CONTRACT OF CALIFORNIA ASSOCIATED RAISIN COMPANY, 1918

THIS AGREEMENT, Made this..... day of ....., 191.., between CALIFORNIA ASSOCIATED RAISIN CO., a Corporation, hereinafter called the Buyer, and ...., called the Seller, WITNESSETH:

That the Buyer does hereby purchase, and the Seller does hereby sell, all of the crops of..... raisins to be produced during the year 1918, 1919 and 1920 on the following described lands in..... County, California, to-wit:

.....

.....

at and for the following minimum prices net to the Seller, payable six days after the receipt of said raisins by the Buyer at the place mentioned below:

3½ cents per pound for first crop Muscats;
3 cents per pound for second crop Muscats;
3½ cents per pound for Sultanas;
3½ cents per pound for Thompson Seedless;
3 cents per pound for Malagas and Feherzagos;
4½ cents per pound for sulphur bleached Thompson Seedless;

provided, however, that the Seller in order to be entitled

to the price above specified for sulphur bleached Thompson Seedless in any year, shall notify the Buyer in writing on or before August 1st of such year of his intention to bleach the same, and if he shall fail to so notify the Buyer, such raisins, if bleached, shall be delivered and paid for and treated hereunder in all respects as if unbleached.

All of said raisins shall be, by the Seller, thoroughly and properly dried and cured, of good color, in original condition, and free from damage of any kind, and shall be delivered upon demand by the Buyer at any time after they are cured, but not later than December 1st in each year at ....., California; and if any of said raisins are of inferior quality, proper deduction shall be made from the prices agreed to be paid therefor; any dispute as to the deduction to be made to be settled by arbitration; each party to appoint one arbitrator, who shall jointly select a third, and the decision of the majority of said arbitrators shall be binding upon the parties; all expenses of the arbitration to be borne by the party against whom the decision shall be rendered; provided, however, that in all cases the minimum deduction to be made on account of material damage by rain shall be one-fourth of one cent per pound.

This instrument is intended by the parties to pass to and vest in the Buyer a present title to all of the crops of raisins covered hereby, and to give to the Buyer the right to the possession of said raisins when and as they are placed in sweat boxes, and immediately thereafter the Buyer shall have the right to enter upon said premises and remove the said raisins; but the right of the Buyer to so enter and remove said raisins shall not affect

the obligation of the Seller to deliver the same as above provided.

The Buyer is hereby given the option to extend this contract to cover all or any of the varieties of raisins produced upon the above described land during the years 1921, 1922 and 1923, provided notice of the exercise of such option, in writing, is given by the Buyer to the Seller on or before April first, 1921, and upon the giving of such notice this contract shall apply and attach to the crops of raisins for said years; and the same shall thereupon be included in the purchase and sale herein made to the same extent as though expressly covered by this contract in the first instance.

For the consideration herein expressed, in addition to the prices hereinabove agreed to be paid, the buyer agrees to use its best efforts to resell said raisins at prices higher than the minimum prices so paid, and if it shall obtain such higher prices it will pay the excess over to the Sellers named in this and similar contracts, according to the quantities and varieties of raisins (or if bleached Thompsons then according to the quantities and grades thereof) received from the respective Sellers, first deducting, to be retained for itself, the sum of one-fourth of one cent per pound for all raisins received under such contracts, and also each Seller's pro rata share of all expenses of the Buyer incurred in its operations during the twelve months next preceding October 1st in each year; such additional payments to be made on or before November 15th in each year following the year that the Buyer shall be able to ascertain approximately the excess realized on the resale thereof, a payment on account of such excess, as to such variety or varieties, shall be made to the Seller on said date the balance, if

any, to be paid on November 15th of said year as above provided. Any loss sustained on the resale of raisins received hereunder shall be borne by the Buyer.

The raisins received hereunder shall be mingled and sold with other raisins of like variety purchased by the Buyer under contracts similar to this contract, and the amount to be paid the Seller in final settlement therefor, shall be based upon the average price per pound at which all raisins of like variety shall have been sold by the Buyer during the year ending on September 30th of the year following the receipt of such raisins; the portion of the crop remaining unsold on that date, if any, to be deemed to have been sold at the prices prevailing on that date; it being understood that for all the purposes hereof second crop Muscats shall be deemed to be a separate and distinct variety; and further that bleached Thompson Seedless shall be graded and settled for according to the grades thereof delivered by the respective Sellers.

The Buyer agrees, in further consideration of the agreements on the part of the Seller herein contained, and the Seller's faithful performance thereof, that if, as a result of its operations during the twelve months preceding October 1st in any year during the period of the life of this contract, it shall realize a net profit in excess of eight per cent of its then issued stock, together with such sum as may be necessary to maintain its surplus at $500,000.00, it will distribute such excess to the Sellers named in this and similar contracts in stock of the Buyer at its par value fully paid up, or in cash, at the option of the Buyer, such distribution to be made upon the same basis as above provided for settlements for excess on resales.

The parties hereto, fully understanding and admitting

that it will be impracticable, or extremely difficult to fix the actual damage to the Buyer which will result from the breach of this contract by the Seller, hereby expressly agree and stipulate that in the event of the Seller's willful neglect, failure or refusal to deliver to the Buyer the raisins purchased hereunder, the Seller will pay to the Buyer the sum of two cents per pound for all raisins covered hereby, and so undelivered, as liquidated damages for such breach; any judgment recovered against the Seller in any suit to enforce this contract or any right thereunder to include a reasonable attorney's fee to be fixed by the court rendering such judgment.

In consideration of the agreements on the part of the Buyer herein contained, the Seller agrees that this contract is made for the benefit of, and is beneficial to, the land herein described, and that the obligation of the Seller to deliver all of said raisins, or to pay damages for failure to so deliver, shall be and remain a lien upon said land for the full term of this contract and the extension thereof, and such lien may be enforced in the same manner as other liens upon real property regardless of the ownership of said land.

This contract shall inure to the benefit of and bind the said land and the heirs, administrators, successors or assigns of the respective parties hereto.

The notices herein provided to be given shall be deemed to have been given to the Buyer when mailed to its office in Fresno, California, and to the Seller when mailed to his address as noted hereon.

The undersigned seller affirms that crops covered by this contract are not the property of any other person, firm or packing concern by virtue of any contract signed by him.

IN WITNESS WHEREOF, the parties hereto have executed this contract in duplicate the day and year first above written.

(Buyer) CALIFORNIA ASSOCIATED RAISIN CO.

By.....

(Seller) .....

Seller's Address .....

Witness to Seller's Signature

.....

APPENDIX I

MARKETING AGREEMENT OF TEXAS FARM BUREAU COTTON ASSOCIATION, 1921

The Texas Farm Bureau Cotton Association, a non-profit association, with its principal office at Dallas, Texas, hereinafter called the Association, first party, and the undersigned Grower, second party, agree:

1. The Grower is a member of the Association and is helping to carry out the express aims of the Association for co-operative marketing, for minimizing speculation and waste, and for stabilizing cotton markets in the interest of the grower and the public, through this and similar organizations undertaken by other growers.

2. The Association agrees to buy and the Grower agrees to sell and deliver to the Association all of the cotton produced or acquired by or for him in Texas during the years 1921, 1922, 1923, 1924 and 1925.

3. The Grower expressly warrants that he has not heretofore contracted to sell, market or deliver any of his said cotton to any person, firm or corporation except as noted at the end of this agreement. Any cotton covered by such existing contracts shall be excluded from the terms hereof for the period and to the extent noted.

4. (a) All cotton shall be delivered at the earliest reasonable time after ginning, to the order of the Association, at the warehouse controlled by the Association, or at the nearest public warehouse, if the Association

controls no warehouse in that immediate district or by shipment as directed, to the Association and by delivery of the endorsed warehouse receipts or bills of lading properly directed.

(b) Any deduction or allowance or loss that the Association may make or suffer on account of inferior grade, quality or condition at delivery, shall be charged against the grower individually.

(c) The Association shall make rules and regulations and shall provide inspectors or graders or classifiers to standardize, grade and class the quality and method and manner of handling, pressing and shipping such cotton; and the Grower agrees to observe and perform any such rules and regulations and to accept the grading established by the Association, which shall be in accordance with the Official Cotton Standards of the United States.

5a. The Association shall pool or mingle the cotton of the Grower with cotton of a like variety, grade and staple delivered by other growers. The Association shall classify the cotton and its classification shall be conclusive. Each pool shall be for a full season.

5b. The Association will endeavor to sell the cotton gradually, as the spinning industry requires it, or at the best possible price before another crop is produced, but in case prices are not satisfactory or production is greater than consumption or there are abnormal trade or financial conditions, the Association will, in its discretion, hold such part of the cotton as may not be sold at a satisfactory price, until there is a fair demand for it.

6. The Association agrees to resell such cotton, together with cotton of like variety, grade and staple, delivered by other growers under similar contracts, at the

best prices obtainable by it under market conditions; and to pay over the net amount received therefrom (less freight, insurance and interest), as payment in full to the Grower and Growers named in contracts similar hereto, according to the cotton delivered by each of them, after deducting therefrom, within the discretion of the Association, the costs of maintaining the Association, organization fee and annual membership dues to the Texas Farm Bureau Federation (unless otherwise paid), and costs of handling, grading and marketing such cotton; and of reserves for credits and other general purposes (said reserves not to exceed one per cent of the gross resale price). The annual surplus from such deductions must be prorated among the Growers delivering cotton in that year on the basis of deliveries.

7. The Grower agrees that the Association may handle in its discretion, some of the cotton in one way and some in another; but the net proceeds of all cotton of like quality, grade and staple, less charge, costs and advances, shall be divided ratably among the Growers in proportion to their deliveries to each pool, payments to be made from time to time until all the accounts of each pool are settled.

8. The Association may sell the said cotton, within or without this state, directly to spinners or exporters or otherwise, at such time and upon such conditions and terms as it may deem profitable, fair and advantageous to the Growers; and it may sell all or any part of the cotton to or through any agency, now established or to be hereafter established, for the co-operative marketing of the cotton of growers in other states throughout the United States, under such conditions as will serve the joint interest of the growers and the public; and any

proportionate expense connected therewith shall be deemed marketing costs under Paragraph 6.

9. The Grower agrees that the Association shall borrow money in its name on the cotton, through drafts, acceptances, notes or otherwise, or on any warehouse receipt or bills-of-lading or upon any accounts for the sale of cotton or on any commercial paper delivered therefor. The Association shall pro-rate the money so received among the growers equitably as it may determine, for each district and period of delivery.

10. The Association may establish selling offices, warehouses, plants, marketing, statistical or other agencies in any place.

11. The Grower shall have the right to stop growing cotton and to grow anything else at any time at his free discretion; but if he produces any cotton during the term hereof, it shall be included under the terms of this agreement and must be sold only to the Association.

12. Nothing in this agreement shall be interpreted as compelling the Grower to deliver any specified quantity of cotton per year; but he shall deliver all the cotton produced or acquired by or for him.

13. (a) This agreement shall be binding upon the Grower as long as he produces cotton directly or indirectly, or has the legal right to exercise control of any commercial cotton or any interest therein during the term of this contract.

(b) If this agreement is signed by the members of a co-partnership, it shall apply to them and each of them individually in the event of the dissolution or termination of the said co-partnership.

(c) If the Grower places a crop mortgage upon any of his crops during the term hereof, the Association shall

have the right to take delivery of his cotton and to pay off all or part of the crop mortgage for the account of the Grower and to charge the same against him individually. The Grower further agrees that if the mortgagee desires, he will execute in favor of the creditor an assignment of his interest in the cotton which he has sold or will sell, to the Association for the protection of the creditor to the extent of the creditor's just claim, and the Association in turn agrees, upon notice of such assignment, to respect the same and to pay to the creditor to the extent of his just claim the proceeds otherwise due the Grower.

The Grower shall notify the Association prior to making any crop mortgage; and the Association will advise the Grower in any such transactions.

14. From time to time the Grower agrees to mail to the Association any statistical data requested, on the forms provided for that purpose by the Association.

15. This agreement is one of a series generally similar in terms, comprising with all such agreements, signed by individual growers, or otherwise, one single contract between the Association and the said Growers, mutually and individually obligated under all of the terms thereof. The Association shall be deemed to be acting in its own name, for all such growers, in any action or legal proceedings or on arising out of this contract.

16. (a) The Grower hereby expressly authorizes the Association to deliver to any warehouse corporation organized for co-operation with this Association, any or all of his cotton for handling, processing or storing; and to charge against his cotton the prorated costs of such services to his cotton and his prorated shares of the funds necessary to create a reserve, equivalent to one class of its preferred stock annually plus bonus, to retire

the said class; and to pay the interest on advances and the dividends on all outstanding preferred stock.

(b) The Grower shall not be charged for such deductions except on account of warehouses within his immediate district, as determined by the Association; and for such deductions the Grower shall receive a proportionate interest in such warehouses.

17. If the Grower has on hand any cotton of the 1921 or previous crops, free of liens and capable of delivery, he shall deliver such cotton to the Association as it may direct, to be graded by the Association and marketed by it in pools wholly separate from all other deliveries here made, but generally in the manner hereinabove set forth.

18. (a) Inasmuch as the remedy at law would be inadequate; and inasmuch as it now and ever will be impracticable and extremely difficult to determine the actual damage resulting to the Association, should the Grower fail so to sell and deliver all of his cotton, the Grower hereby agrees to pay to the Association for all cotton delivered, sold, consigned, withheld or marketed by or for him, other than in accordance with the terms hereof, the sum of five cents per pound, middling basis, as liquidated damages for the breach of this contract; all parties agreeing that this contract is one of a series dependent for its true value upon the adherence of each and all the growers to each and all of the said contracts.

(b) The Grower agrees that in the event of a breach or threatened breach by him of any provision regarding delivery of cotton, the Association shall be entitled to an injunction to prevent breach or further breach hereof and to a decree for specific performance hereof; and the parties agree that this is a contract for the purchase and sale of personal property under special circumstances and conditions and that the buyer cannot go to the open

markets and buy cotton to replace any which the Grower may fail to deliver.

(c) If the Association brings any action whatsoever, by reason of a breach or threatened breach hereof, the Grower agrees to pay to the Association all costs of court, costs for bonds and otherwise, expenses of travel and all expenses arising out of or caused by the litigation and any reasonable attorney's fees expended or incurred by it in such proceedings; and all such costs and expenses shall be included in the judgment and shall be entitled to the benefits of any lien securing any payment thereunder.

Read considered and signed by the Grower, as of the date determined by the Association Contract, in the State of Texas.

Read, considered and signed at..... Texas, this.....day of....., 1922.

Grower.....

(Do not Sign Without Reading)

P. O. Address.....

Membership fee to cotton only; paid in cash.

Deduct from moneys received from sale of cotton.

Production in 1920 was.....bales.

I have placed a mortgage or other lien on my 1922 crop in favor of..... P. O. .....

Accepted by Association in accordance with resolution adopted by the Board of Directors of the Association on Aug. 1, 1921.

TEXAS FARM BUREAU COTTON ASSOCIATION.

By.....Secretary.....

Date:.....

DUES AGREEMENT—To be Executed by Farm Bureau and Commodity Association Members.

I am a member of the co-operative marketing association checked (x) below:		I am a member of the Texas Farm Bureau Federation and hereby authorize and instruct the Texas Farm Bureau Cotton Association to pay to said Federation my Annual dues of Ten Dollars ($10.00) for the years 1922 to 1925, inclusive, and to deduct same from any amounts due me from the sale of cotton payment to be made on or before January 1st of each year.
Texas Grain Sorghum G. Assn.	Dues will be collected through only one association, of the member's choice, as here indicated:	
Alfalfa—Elephant Butte		
Alfalfa—Fort Stockton		
Alfalfa—Balmorrhea . .		
Texas Hay Association		
Farm Bureau Melon Assn.		
F. B. Sweet Potato Assn.	.....	
N. Texas F. B. Dairymen's Assn.		Name .....
Texas Wheat Growers Assn.	.....	P. O. .....
S. W. Poultry Producers Assn.		
F. B. Onion Growers Assn.	.....	County .....
F. B. Ribbon Cane Growers Assn. . . .		

DUES AGREEMENT—To be Executed by those Who Join the Farm Bureau and the Texas Farm Bureau Cotton Association.

I hereby apply for membership in the Texas Farm Bureau Federation, and authorize and instruct the Texas Farm Bureau Cotton Association to pay to the said Federation $5.00 Membership Fee (first year only) and $10.00 annual dues for the years 1922 to 1925, inclusive, and to deduct same from any amount due me from sale of cotton; payment to be made on or before January 1st of each year.

This ..... day of ....., 192..

CASH CREDIT—PAID HEREWITH

$5.00 Membership Fee — Name.....

$10.00 Annual Dues, November 1, 1923 — Postoffice.....

..... County.....

(To be signed by Applicant when payment is made)

APPLICATION FOR MEMBERSHIP

The undersigned Texas Cotton Grower herewith applies for membership in the TEXAS FARM BUREAU COTTON ASSOCIATION.

The undersigned states that he has read the Articles of Incorporation, By-Laws, original Association Agreement and Standard Marketing Agreement of the Association and that he understands and approves them and accepts them as binding upon him in all their terms.

The undersigned agrees to perform all of the obligations of the By-Laws and Marketing Agreement.

Dated at ....., Texas, ..., 1921.

Grower .....

Address .....

Accepted at Dallas, Texas, ..., 1921.

Texas Farm Bureau Cotton Association.

By .....

Secretary.

APPENDIX J

MARKETING AGREEMENT OF BURLEY TOBACCO GROWERS' CO-OPERATIVE ASSOCIATION, 1921

MEMBER'S AGREEMENT WITH THE ASSOCIATION

The Burley Tobacco Growers' Co-operative Association, a nonprofit Association, hereinafter called the Association, first party, and the undersigned Grower, second party, agree:

THIS IS FOR CO-OPERATIVE MARKETING

1. The grower is a member of the Association and is helping to carry out the express aims of the Association for co-operative marketing, for minimizing speculation and waste and stabilizing tobacco markets in the interest of the grower and the public, through this and similar obligations undertaken by other growers.

GROWER SELLS TOBACCO TO ASSOCIATION FOR FIVE YEARS

2. The Association agrees to buy and the grower agrees to sell and deliver to the Association all of the tobacco produced by or for him or acquired by him as landlord or lessor, during the years 1922, 1923, 1924, 1925 and 1926.

IF YOU HAVE A CROP MORTGAGE THAT TOBACCO DOES NOT HAVE TO GO TO THE ASSOCIATION IF YOU CAN'T CONTROL IT

3. The grower expressly warrants that he has not heretofore contracted to sell, market or deliver any of his said tobacco to any person, firm or corporation, ex-

cept as noted at the end of this agreement. Any tobacco covered by such existing contracts or crop mortgage shall be excluded from the terms hereof for the period and to the extent noted, if the lien-holder insists upon the exercise of any right of possession or sale.

THE ASSOCIATION TELLS YOU WHERE TO DELIVER

4. (a) All tobacco shall be delivered at the earliest reasonable time after cutting or curing, to the order of the Association, at the warehouse or plant controlled or specified by the Association; or at the nearest warehouse, if the Association controls or specifies no warehouse or plant in that immediate district; or by shipment, as directed, to the Association; and by delivery to the Association of the indorsed warehouse or other receipts or bills-of-lading, properly directed.

POOR TOBACCO IS PENALIZED

(b) Any deduction or allowance or loss that the Association may make or suffer on account of inferior grade quality or condition at delivery shall be charged against the grower individually.

ASSOCIATION WILL TRY TO STANDARDIZE METHODS

(c) The Association shall make rules and regulations and provide inspectors or graders to standardize and grade the quality and method and manner of handling, curing and shipping such tobacco and the grower agrees to observe any such rules and regulations and to adopt the grading established by the State and Federal authorities and the Association.

ALL TOBACCO WILL BE POOLED FOR EACH YEAR BY TYPE AND GRADE

5. The Association shall pool or mingle the tobacco of the Grower with tobacco of a like type, grade and quality

delivered in the same crop year by other growers. The Association shall classify the tobacco and its classification shall be conclusive.

The tobacco delivered in any crop year to any point at the order of the Association shall be handled in one major pool, and the minor pools shall be by type and grade.

ASSOCIATION WILL RESELL ALL TOBACCO AND PAY NET PORCEEDS TO GROWER—COSTS OF OPERATION AND OVERHEAD WILL BE DEDUCTED, BUT THE ASSOCIATION FORBIDDEN TO MAKE ANY PROFIT FOR ITSELF

6. The Association agrees to resell such tobacco, together with tobacco of like type, grade and quality delivered by other growers under similar contracts, at the best prices obtainable by it under market conditions, and to pay over the net amount received therefrom (less freight, insurance and interest), as payment in full to the grower and growers named in contracts similar hereto, according to the tobacco delivered by each of them, after deducting therefrom, within the discretion of the Association, the costs of maintaining the Association and of handling, grading and marketing such tobacco; and of creating funds for credits and other general commercial purposes (said funds not to exceed 1 per cent of the gross resale price). The annual surplus from such deductions must be prorated among the growers delivering tobacco in that year on the basis of deliveries.

EVERY GROWER GETS THE SAME AMOUNT FOR THE SAME TYPE, QUALITY AND QUANTITY OF TOBACCO

7. The grower agrees that the Association may handle, in its discretion, some of the tobacco in one way and

some in another; may sell some upon delivery; may cure or process or manufacture all or any portion thereof, but the net proceeds of all tobacco or tobacco products of like type, quality and grade, less charges, costs and advances, shall be divided ratably among the growers in proportion to their deliveries to each pool, payments to be made from time to time until all the accounts of each pool are settled.

The Association may contract with the owners of re-drying plants to re-dry and store the tobacco delivered by the members of the Association.

THE TOBACCO WILL BE SOLD ANYWHERE—FOR EXPORT OR OTHERWISE—WHERE IT WILL BE MOST PROFITABLE

8. The Association may sell the said tobacco, within or without the United States, directly to manufacturers or exporters or otherwise, at such time and in such form and upon such conditions and terms as it may deem profitable, fair and advantageous, to the growers, and it may sell all or any part of the tobacco with or through any other agency hereafter established, for the co-operative marketing of the tobacco of growers in other States throughout the United States, under such conditions as will serve the joint interest of the growers and the public; and any proportionate expenses connected therewith shall be deemed marketing costs under paragraph six.

THE ASSOCIATION CAN RAISE MONEY TO MAKE FIRST PAYMENT TO GROWERS

9. The grower agrees that the Association shall borrow money in its name on the tobacco, through drafts, acceptances, notes or otherwise, or on any warehouse receipts or bills of lading or upon any accounts for the sale of tobacco or on any commercial paper delivered therefor.

The Association shall prorate the money so received among the growers equitably, as it may determine, for each district and period of delivery.

The Association agrees to accept drafts drawn against it by the grower for any amount specified and determined by it, upon delivery of tobacco hereunder, and to assist the grower to discount such drafts, secured by the warehouse receipts, through the most advantageous banking system.

OFFICES OR PLANTS WHEREVER THEY ARE NEEDED

10. The Association may establish selling offices, warehouses, plants, marketing, statistical or other agencies in any place.

YOU CAN STOP GROWING TOBACCO IF YOU WISH

11. The grower shall have the right to stop growing tobacco and to grow anything else at any time at his free discretion; but if he produces any tobacco, or acquires or owns any interest in any tobacco, as landlord or lessor, during the term hereof, it shall all be included under the terms of this agreement and must be sold only to the Association.

YOU DO NOT HAVE TO DELIVER ANY PARTICULAR AMOUNT

12. Nothing in this agreement shall be interpreted as compelling the grower to deliver any specified quantity of tobacco each year; but he shall deliver all the tobacco produced by or for him.

YOU DELIVER ALL THE TOBACCO YOU RAISE

13. (a) This agreement shall be binding upon the grower as long as he produces tobacco directly or indirectly, or has the legal right to exercise control of any

commercial tobacco or any interest therein as a producer or landlord during the term of this contract.

(b) If this agreement is signed by the members of a co-partnership, it shall apply to them and each of them individually in the event of the dissolution or termination of the said co-partnership.

YOU MAY MAKE A CROP MORTGAGE—THE ASSOCIATION WILL TRY TO HELP YOU SECURE STANDARD TERMS

(c) If the grower places a crop mortgage upon any of his crops during the term hereof, the Association shall have the right to take delivery of his tobacco and to pay off all or part of the crop mortgage for the account of the grower and to charge the same against him individually.

The grower may place a crop mortgage upon his tobacco; and shall notify the Association prior to making any such mortgage. The Association will assist and advise the grower in any such transaction as far as it deems proper.

STATISTICS ARE NEEDED

14. From time to time the grower agrees to mail to the Association any statistical data requested, on the forms provided for that purpose by the Association.

ALL CONTRACTS ARE ALIKE

15. This agreement is one of a series generally similar in terms comprising with all such agreements, signed by individual growers, or otherwise, one single contract between the Association and the said growers annually and individually obligated under all of the terms thereof. The Association shall be deemed to be acting in its own name for all such growers in any action or legal proceedings on or arising out of this contract.

THE GROWER AUTHORIZES THE ASSOCIATION TO PROVIDE CURING OR RE-DRYING PLANTS IF IT NEEDS THEM

16. (a) The grower hereby expressly authorizes the Association to deliver to any warehousing or other corporation organized for co-operation with this Association any or all of his tobacco for handling, processing, or manufacturing, or storing; and to charge against his tobacco and his prorated share of the funds necessary to create a reserve, equivalent to one class of its preferred stock annually plus bonus, to retire the said class; and to pay the dividends on all outstanding stock thereof.

(b) The grower shall be charged for such deductions only on account of warehouses or plants within his district or within his benefit, as determined conclusively by the Association; and for such deductions the grower shall receive a proportionate interest in such corporation.

ANY OLD CROP TOBACCO MAY BE DELIVERED TO THE ASSOCIATION TO SELL

17. If the grower has on hand, upon the date of mailing notice of the actual incorporation of the Association, any tobacco of the 1921 or any other crops, free of liens and capable of delivery, he shall deliver such tobacco to the Association, as it may direct, to be graded by the Association and marketed by it, in pools wholly separate from all other deliveries hereunder, but generally in the manner here set forth.

DO NOT BREAK THE CONTRACT—THIS IS EXPENSIVE

18. (a) Inasmuch as the remedy at law would be inadequate; and inasmuch as it is now and ever will be impracticable and extremely difficult to determine the actual damage resulting to the Association should the grower fail so to sell and deliver all of his tobacco, the

grower hereby agrees to pay to the Association for all tobacco delivered, consigned or marketed or withheld by or for him, other than in accordance with the terms hereof, the sum of five cents per pound as liquidated damages, averaged for all types and grades of tobacco, for the breach of this contract; all parties agreeing that this contract is one of a series dependent for its true value upon the adherence of each and all of the growers to each and all of the said contracts.

YOU WILL GET HIS TOBACCO ANYWAY

(b) The grower agrees that in the event of a breach or threatened breach by him of any provision regarding delivery of tobacco, the Association shall be entitled to an injunction to prevent breach or further breach thereof and to a decree for specific performance hereof; and the parties agree that this is a contract for the purchase and sale of personal property under special circumstances and conditions, and that the buyer cannot go to the open markets and buy tobacco and replace any which the grower may fail to deliver.

VIOLATORS PAY THE COSTS OF FIGHTING THEM

(c) If the Association brings any action whatsoever by reason of a breach or threatened breach hereof, the grower agrees to pay to the Association all costs of court, costs for bond and otherwise, expenses of travel and all expenses arising out of or caused by the litigation and any reasonable attorney's fee expended or incurred by it in such proceedings; and all such costs and expenses shall be included in the judgment and shall be entitled to the benefit of any lien securing any judgment hereunder.

THE CONTRACT IS COMPLETE ON ITS FACE

19. The parties agree that there are no oral or other conditions, promises, covenants, representations or inducements in addition to or at variance with any of the terms hereof; and that this agreement represents the voluntary and clear understanding of both parties fully and completely.

NATIONAL CENTRAL AGENCY

20. The Association is expressly authorized to exercise any or all of the grading, inspecting, marketing or other powers or rights granted hereunder through any central agency to be organized for co-ordinating the activities of this and similar co-operative marketing associations in other States. The Association shall, if possible, enter into any contract for such purpose and may agree to pool the products delivered hereunder with products of similar variety, grade and quality delivered to generally similar associations under marketing agreements substantially the same in effect as this agreement; and to unite with any such associations in the joint purchase, construction, lease or use of facilities and to assume obligations therefor.

Any costs of maintaining such central agency shall be pro-rated among the said Associations on the basis of the gross sale proceeds from the products delivered by them respectively and shall be considered part of the costs and deductions provided for in Paragraph six.

The Association agrees to assist in forming such central agency as soon as any similar Association is organized in the United States.

Read, considered, and signed by the grower, as of the date determined by the Association Contract, in the State hereinbelow indicated.

(End of Marketing Agreement.)

MINOR CHANGES MAY BE MADE

21. These provisions are subject to minor modification or amendment by the Organization Committee on the suggestion of State officials or otherwise, so as to carry out the general purposes hereof.

ALL CONTRACTS ARE THE SAME—THERE ARE NO FAVORITES

22. It is expressly agreed that this instrument is one of a series substantially identical in terms. All such instruments shall be deemed one contract for the purpose of binding the subscribers to the same extent as if all of the subscribers had signed one such contract.

Read, considered, and signed at.....
this ..... day of ....., 1921.

(Do not sign without reading.)

Grower .....

P. O. Address.....

County..... State..... .

Production in 1920 was.....pounds
of ..... type; acres .....

APPENDIX K

VIRGINIA TOBACCO WAREHOUSE ("TRUE NAME") LAW

CHAPTER 109.

Approved March 26, 1923.

SECTION 1. Every person who shall deliver any leaf tobacco to a warehouseman or to a co-operative marketing association for sale, offer for sale or display for sale thereof, shall impart to such warehouseman or co-operative marketing association, the true name of the owner of said leaf tobacco; and it shall be the duty of such warehouseman or co-operative marketing association to keep a record of such purchase or delivery showing the quantity of leaf tobacco so delivered, and said name of the owner thereof, given as provided herein.

SECTION 2. Where leaf tobacco is delivered to a warehouseman or co-operative marketing association for sale, offer for sale or display for sale, by a person other than the grower thereof, or the landlord of the land upon which said tobacco was grown, it shall be the duty of said warehouseman or co-operative marketing association to keep a record showing the facts required in section one of this act, and in addition thereto if possible the name of the person from whom the person delivering said tobacco obtained the same, and the name of the original grower thereof, and the name of the landlord upon whose land

said tobacco was grown, if the same was grown by a tenant. And said person, other than such grower or landlord, shall impart to such warehouseman or co-operative marketing association the true name of the person from whom he obtained said tobacco, and the name of said grower thereof and said landlord. Provided, however, that this section shall not apply to licensed leaf tobacco dealers offering for re-sale tobacco once sold upon the warehouse floor, and with respect to which the provisions of this act have previously been complied with.

Section 3. Said warehouseman or co-operative marketing association shall also place upon all leaf tobacco delivered to him or to it for sale, offer for sale, or display for sale, a ticket or card which shall state the matters and things required to be recorded by said warehouseman or co-operative marketing association by sections one and two of this act.

Section 4. All cards or tickets kept, prepared or placed upon tobacco as required herein, shall, for the period of ten days after the delivery of such tobacco, be open to the inspection of any representative of any public tobacco warehouse, or tobacco growers co-operative association during regular business hours and who shall have access to the place where said cards or tickets are kept for the purpose of such inspection.

Section 5. Any person who shall give a fictitious or false name to such warehouseman or co-operative marketing association, or who shall fail to give to such warehouseman or co-operative marketing association the true name of the owner of said leaf tobacco or said person from whom said tobacco was obtained, or said grower and said landlord, upon delivering the same as afore-

said, shall be guilty of a misdemeanor. Any warehouseman or co-operative marketing association who shall fail to comply with any of the provisions of this act, or who shall deny to any such representative the privilege of such inspection or access, as provided in section four, shall be guilty of a misdemeanor. Any warehouseman or co-operative marketing association who shall buy or sell tobacco as above set forth, knowing that the name in which said leaf tobacco is sold, or any name given pursuant to the provisions hereof, is false or fictitious, shall be guilty of a misdemeanor.

SECTION 6. Any person guilty of a misdemeanor under the provisions of this act shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars.

SECTION 7. The term "warehouseman" as used in this act is hereby defined as any person, firm or corporation engaged in the business of selling leaf tobacco at auction, for a commission or for any other consideration.

SECTION 8. The purpose of this act is to prevent frauds in the handling and sale of leaf tobacco.

APPENDIX L

MAINE CO-OPERATIVE LIEN LAW

CHAPTER 213.

Approved April 11, 1925.

SECTION 1. Definition of terms used in the act. The word "liens," as used in this act, shall include all liens on, security interests in, or claims upon crops or other farm products arising at law or in equity, by statute or otherwise, and including the following in so far as they attach to crops or other farm products; crop liens, vendors' liens, labor, money, material and supply liens, landlord and owners' liens, pledges, chattel mortgages, attachments, judgment liens and trustee process. It shall also include the lien attaching to proceeds arising from such commodities, under the terms of this act.

The word "lienholder," as used in this act, shall include all persons, firms, partnerships, corporations and associations in whom an above described lien is vested, or who have contracted for such a lien.

The word "association," as used in this act, shall include all co-operative agricultural and horticultural associations, not conducted for profit, created or operating under the co-operative marketing act, chapter eighty-eight of the public laws of nineteen hundred and twenty-three. It shall also include all similar associations, foreign, or domestic operating within this state either de jure or de facto.

The words "marketing agreement," as used in this act, shall include any proper contracts for the sale or delivery of farm commodities to such associations.

The word "member," as used in this act, shall signify a member of an above described association, his agent or privy.

The word "crop," as used in this act, shall signify any or all commodities which an association may legally contract for in a marketing agreement.

SECTION 2. Filing and recording of marketing agreements. The association may file for record an original or an authenticated copy of an executed marketing agreement in the office of the register of deeds in the county, where the property is produced, or if there be several registry districts in a county, then in the registry district where the property is produced. The register shall record such agreement in a book kept for that purpose, noting therein, and on the agreement, the time when it was received; and it shall be considered as recorded when received. After the filing of such agreement, the association may, in lieu of filing all other agreements obtained from its members, cause to be filed an affidavit prepared and signed by its secretary or other officer reciting that the association has executed other marketing agreements similar thereto giving the names and addresses of the members party thereto, the date on which the contracts were executed by the members, and the date of expiration if different from those of the recorded agreement; and such affidavit, when filed by the association with the register shall be recorded along with the marketing agreement. Such association may from time to time file for record supplemental affidavits covering additional marketing agreements.

SECTION 3. Effect of filing and recording is to convey notice. The filing and recording of such agreements or affidavits shall convey full notice of the existence of the various agreements and of the rights, claims and interest of such association in the crops covered thereby.

SECTION 4. Liens on crops before delivery, rights of lienholders; duties of members in relation to delivery to association. Whenever a crop has not yet been delivered by the members to such association under the terms of such recorded marketing agreement, and a decree of court has not been issued requiring delivery of the crop to the association, a lien shall attach to such crop in favor of any person, firm, partnership or association who under the laws of this state would be entitled to such a lien in case no such marketing agreement concerning such crop existed. But such a lien shall be subject to the limitation that it shall not entitle such lienholder to possession, use, enjoyment or disposition of such crops as against such member, or association, or one holding under them; nor shall it entitle such lienholder to the incidents and remedies of such lien whereby the member would be deprived of full possession, use, enjoyment and disposition of such crop so far as is necessary to the further production and delivery of such crop in prospective fulfillment or in performance of his marketing agreement; nor shall it deprive such association of its rights under the marketing agreements to demand possession and enforce by appropriate legal procedure its right to possession of such crop.

Provided, however, that whenever such crop shall not be so far produced as to entitle such association to deliv-

ery by the member under the terms of the marketing agreement, and on failure of such member to continue producing after reasonable opportunity and written notice given by the lienholder to such member, such lienholder may exercise any right or remedy against such crop under its lien in the same manner and with the same force and effect as if such marketing agreement did not exist. But when such crop thereafter is produced, it must be delivered to the association for marketing, regardless of the rights accrued thereto.

And provided further, whenever such crop shall be so far produced as to entitle such association to delivery under its marketing agreement, and whenever such member in violation fails to deliver such crop under the terms thereof, such association must within a reasonable time take steps to commence an appropriate action for delivery of the crop in specie; else, after written demand on such association at its main office by such lienholder, if the association fails to act, such lienholder may exercise any right or remedy under its lien in the same manner and with the same force and effect as if such marketing agreement did not exist.

And provided further, that, if said association is united with other associations organized under a similar agreement for similar purposes and the business of said association is transacted through a central agency, in that event such written demand shall be made on said central agency at its main office instead of on said association.

SECTION 5. Lien attaches to members claim against association after delivery of crop. Whenever such crop shall be delivered to the association under its marketing

agreement, or a decree of court shall be issued requiring delivery of the crop to the association, then and thereafter, a lienholder who has acquired a lien subsequent to the filing and recording of the marketing agreement or affidavit covering such crop and prior to the date of the expiration thereof, shall be no longer entitled to any lien, interest in, or claim against such crop, but he shall instead acquire a lien on the claim of the member against the association for the net proceeds of sales by the association, whether specific proceeds or prorated proceeds of graded or other pools, or against the member's net interest in the association through his delivery of the commodity under the marketing agreement. The rights of the lienholder shall be subject to all the limitations and restrictions as to the sale, disposal, or use of such crop or the net proceeds thereof as are imposed on the member by the recorded marketing agreement.

Section 6. Filing of statement of lien claim. Any person entitled to a lien under this act, shall so far as is consistent with this act, within the time and in the manner prescribed elsewhere by the laws of this state, file a verified statement or other evidence and perform all acts such as are required by law for perfecting and enforcing the respective lien which would arise under similar facts in the absence of this statute.

Section 7. Lienholder must give notice to association of existence of lien claim. When a lien or contract for a lien arises by the will or mutual agreement of the member and the lienholder, the lienholder, in order to effect a lien under this act, must give written notice to the association at its main office of the agreement at the time of entering into it and of the lien at the time of its arising. When a lien arises other than by the will of the

parties or by mutual agreement, the lienholder must give notice to the association at its main office of the lien at the time of the default of the member giving rise thereto. Provided, however, that, if the affairs of said association are being conducted through such central agency as set forth in section five of this act, all notices hereunder shall be given to said central agency at its main office.

SECTION 8. Association must sell and deliver proceeds within ten months; advance payments must be paid to lienholder. The association must within ten months of the delivery of a crop, sell such crop or a similar crop, and make payment to the lienholders out of the proceeds of such sale after deductions therefrom as provided by the marketing agreement. During such period and up to the time of such sale, advance payments due the member must be paid to the lienholder up to the amount of his lien. If such advance payments exceed the final net distribution, the association may recover from such member the amount of the excess. Nothing herein shall cause an association to be liable to any person in case a crop is not delivered to it, or obligate it to sell any greater amount of any crop than is required to pay off such lien; nor shall any association in any case be liable for a greater amount than the net proceeds of the sale of any crop less deductions as provided by the marketing agreement.

SECTION 9. Enforcement of lienholder's claim; procedure; defences available to association; limitation of action. In case of refusal of such association to pay over the proceeds of the sale of such crop under the conditions prescribed above, such lienholder may by appropriate civil action joining the member and association bring suit for the recovery of the value of his lien. Any judgment

in such action shall run solely against the association, and satisfaction thereof by the association shall acquit and discharge it from any claims of or liability to the member up to the amount of the judgment. In such action the association may interpose any defense available to itself or to the member. Provided, however, that nothing in this act shall operate so as to deprive such lienholder of any action allowed him by law against such member for recovery of the debt secured by the lien; and provided further that any right of action arising under this act or otherwise shall be limited by statutes of limitation prescribed by law for the enforcement of liens which would arise under similar facts in the absence of this act.

Section 10. Fees payable to registers of deeds for recording and filing. Every association shall, before any marketing agreement or affidavit is filed and recorded as prescribed in this act, pay the fees specified in this section for such filing and recording.

To the register in the county or registry district in which filed and recorded, as follows:

Original or authenticated copy of marketing agreement, fifty cents.

Affidavit, mentioned in section three, fifty cents, plus one additional cent for each member listed therein.

Section 11. Association to file bond with secretary of state in order to come under provisions of act; amounts of bonds how fixed. No association shall come under the terms of this act unless and until the association shall have deposited with the secretary of state annually, to be payable to and approved by him and subject to increase on his demand in case of depletion thereof, a good and sufficient bond with sureties or a surety com-

pany authorized to do business in the state, in the following amounts: When the total gross value of business done by the association in the next previous calendar year shall have been less than one million dollars, the bond shall be fifty thousand dollars; when greater than one million dollars but less than two and one-half million dollars, the bond shall be seventy-five thousand dollars; when two and one-half million dollars or over, the bond shall be one hundred thousand dollars. Such bond shall be conditioned that the association will fulfill all of its obligations as provided for by this act, and it shall serve as security for the payment of judgments obtained by lienholders against the association under the terms of this act. The bond for the first year in which any cooperative shall conduct any business shall be in the amount of fifty thousand dollars. Provided, however, that, if the affairs of the association are being conducted through such central agency as set forth in section five of this act, the bond provided for by this section shall be given by said central agency for and in behalf of itself and all associations whose affairs are conducted through such central agency so that said central agency shall annually be required to furnish but one bond for itself and all such associations. Such bond so given by said central agency shall be binding on all such associations and contain the same conditions, serve as security for the same payments, and the amounts of said bond shall be in the same amounts, as above set forth, as determined by the total gross value of business done through said central agency in the next previous calendar year.

Section 12. Penalty for enforcing lien in violation of this act; lienholder liable in civil damages. Any lienholder who, in violation of this act, shall knowingly and

wilfully seize or receive or cause to be seized or received any crop, or who shall knowingly and wilfully enforce or attempt to enforce except by appropriate civil process a lien against such crop contrary to this act shall be guilty of a misdemeanor and shall be subject to a fine of not less than one hundred dollars and not more than one thousand dollars for each offense; and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred dollars for each offense.

SECTION 13. Unconstitutionality of part of act not to invalidate remainder. If any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment shall have been rendered.

SECTION 14. Inconsistent acts repealed; applicable provisions of law relating to liens to apply. All acts or parts of acts in conflict with the provisions of this act are hereby repealed. All provisions of law relating to liens shall apply to crops covered by marketing agreements, except where such provisions are inconsistent with the provisions of this act, in which case any such provisions shall be construed as not applying to the liens herein provided for.

APPENDIX M

KENTUCKY POOLING LAW OF 1906 AND 1908 [1]

Chapter 117.

Section 1. It is hereby declared lawful for any number of persons to combine, unite, or pool, any or all of the crops of wheat, tobacco, corn, oats, hay, or other farm products raised by them, for the purpose of classifying, grading, storing, holding, selling, or disposing of same, either in parcels or as a whole, in order or for the purpose of obtaining a greater or higher price therefor than they might or could obtain or receive by selling said crops separately or individually.

Section 2. That contracts or agreements made or entered into by persons with each other, the object or intent of which is to unite, pool, or combine all or any of the crops of tobacco, wheat, corn, oats, hay, or other farm products raised by such persons, for the purpose of classifying, grading, storing, holding, selling, or disposing of said crops or any of them, either in parts or as a whole, in order or for the purpose of obtaining a better or higher price therefor than could or might be obtained by selling said crops separately or individually, are hereby permitted and shall not, because of any such combination or purpose of said persons, be declared illegal or invalid.

Section 3. Such persons so entering into such agreement or contract as is set out in the foregoing sections

[1] Words in italics omitted, words in large type added, by amendment of 1908.

are hereby permitted to select an agent or agents, through or by or with whom said parties so entering into such agreement may classify, grade, store, hold, sell, or dispose of said crops OR ANY OF THEM, AND SAID AGENT OR AGENTS SHALL HAVE THE RIGHT TO TAKE, RECEIVE, HOLD, STORE, CLASSIFY, GRADE, SELL, OR DISPOSE OF SAID CROPS, so placed in such agreement, *as directed or authorized by their principals* for the purpose of accomplishing the object of such combination or agreement: between such principals, and contracts and agreements entered into by such agent or agents for the purpose of classifying, grading, storing, holding, selling, or disposing of such crops so combined, united, or pooled, either in parcels or as a whole, are hereby permitted, and shall not, because of such combination or purpose of such original agreement of such principals so entering into said combination, or of such agent or agents, be declared illegal or invalid. ALL CONTRACTS HERETOFORE MADE BY ANY PERSON OR PERSONS FOR THE PURPOSES SET OUT IN THE FOREGOING SECTIONS ARE HEREBY DECLARED VALID, IF OTHERWISE LEGALLY BINDING ON THE PARTIES. TO PREVENT ANY BREACH OR VIOLATION OF ANY CONTRACT MADE FOR THE PURPOSES SET OUT IN THE FOREGOING SECTIONS A RESTRAINING ORDER AND WRIT OF INJUNCTION MAY BE ISSUED BY PROPER OFFICER, AS PRESCRIBED IN THE CIVIL CODE OF PRACTICE.

FOR ANY BREACH OF VIOLATION OF ANY CONTRACT ENTERED INTO FOR THE PURPOSES SET OUT IN THE FOREGOING SECTIONS, THE INJURED PARTY MAY RECOVER THE DAMAGES SUSTAINED BY HIM BY REASON OF SUCH VIOLATION OF SUCH CONTRACT OF THE PERSON VIOLATING THE SAME, AND ALSO OF ANY PERSON WHO SHALL INDUCE OR PERSUADE ANOTHER TO VIOLATE SUCH CONTRACT, WHICH DAM-

AGES SHALL INCLUDE THE REASONABLE EXPENSE AND ATTORNEY'S FEES INCURRED BY THE INJURED PARTY IN PROSECUTING AN ACTION TO RECOVER SUCH DAMAGES OR TO PREVENT A VIOLATION OF SUCH CONTRACT, IF THE PARTY COMPLAINING SHALL SUCCEED IN DOING SO, WHICH MAY BE RECOVERED IN THE SAME ACTION OR ORIGINAL PROCEEDING. SAID AGENT WHEN SO SELECTED AS HEREIN PROVIDED SHALL HAVE THE SOLE RIGHT TO SELL SAID CROP SO POOLED OR COMBINED, AND IT SHALL BE UNLAWFUL FOR ANY OWNER OF SUCH CROP TO SELL OR DISPOSE OF SAME AND FOR ANY PERSON TO KNOWINGLY PURCHASE THE SAME WITHOUT THE WRITTEN CONSENT OF SUCH AGENT, AND UPON CONVICTION THEREOF HE OR THEY SHALL BE FINED IN ANY SUM OR AMOUNT NOT EXCEEDING $250.00 FOR EACH OFFENSE, TO BE FIXED BY THE JURY IN THEIR DISCRETION.

SECTION 4. WHEREAS, MANY CROPS OF TOBACCO AND OTHER PRODUCTS HAVE BEEN COMBINED AND POOLED IN THIS STATE, UNDER CONTRACT AND AGREEMENT ENTERED INTO FOR THE PURPOSES SET OUT IN THE ABOVE SECTION, AN EMERGENCY IS NOW DECLARED TO EXIST, WHICH REQUIRES THAT THIS ACT SHOULD AND IT SHALL TAKE EFFECT FROM AND AFTER ITS PASSAGE AND APPROVAL BY THE GOVERNOR.[2]

[2] The original Act as passed in 1906 also contained an emergency clause, which read: "Whereas, many persons of this Commonwealth now desire to combine their respective crops of tobacco, wheat, corn, and other farm products, an emergency is now declared. . . ."

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